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Supreme Court, U.S.
FILED

No. 10-782

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In The

# Supreme Court of the United States

MOHAN THAMPI,

*Petitioner,*

v.

MANATEE COUNTY BOARD OF COMMISSIONERS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Court below erred in holding that Petitioner's conduct or speech did not meet the requisites of the "opposition clause" of Title VII of the Civil Rights Act of 1964 (as amended) in the light of the disarray of the circuit courts on this issue. This question also applies to First Amendment retaliation.

2. Whether the circuit court erred in ruling the magistrate did not have to recuse himself even though the magistrate became openly hostile after counsel reported substantive *ex parte* communication by opposing counsel with chambers.

3. Whether the circuit court ruled correctly that Petitioner could not claim retaliation for filing the instant lawsuit under Title VII when he did not specifically plead it in light of the fact that Respondent openly recognized in its summary judgment papers that the matter was being litigated and participated in discovery regarding the same.

## LIST OF PARTIES

The parties below are listed in the caption.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner certifies that the following individuals and/or corporations have an interest in the outcome of the case:

Samuel C. Gold
Attorney for Petitioner

Robert M. Eschenfelder
Attorney for Respondent Corporation
Manatee County Attorney's Office

Tedd N. Williams, Jr.
Manatee County Attorney, Corporate Respondent

Mohan Thampi, Petitioner

Manatee County Board of Commissioners,
Corporate Respondent

Garnet McDonald, Human Resource Analyst,
Manatee County, Corporate Respondent

Dale Garcia, Human Resources Director,
Manatee County, Corporate Respondent

Ed Hunzeker, County Administrator,
Manatee County, Corporate Respondent

Charlie Hunsicker – Hearing Officer,
Manatee County, Corporate Respondent

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## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision of the district court was handed down on June 30, 2010. A timely petition for rehearing was denied on September 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS CITED

Title VII, 42 U.S.C. § 200e-3(a)

> [it] shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an

> investigation, proceeding, or hearing under [Title VII].

First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

This is a truly human story of the highest order. As a result of Petitioner's termination and the subsequent actions to sabotage his career, *infra*, the damage inflicted in this case is enormous. Petitioner's career as an engineer has been destroyed. The hope of an immigrant seeking the American dream dashed. Without clearing up the issues of law raised herein, citizens across this country remain vulnerable.

This appeal primarily involves whether the current jurisprudence of the Eleventh Circuit Court of Appeals follows the binding authority of *Crawford v. Metro Gov't*, 129 S. Ct. 846 (2009). Petitioner, while initially being reluctant, agreed openly and verbally in the office of his supervisor (the gentleman who fired him) and in front of his supervisor's top assistant, that he would be willing to be a witness in Respondent's internal investigation of a race discrimination claim by Deloris Crockett. App. p. 4. The request to Petitioner to be a witness on behalf of Ms. Crockett, an African-American county employee, was made by Ms. Crockett and honored by Petitioner on or about January 4, 2007; he was listed as a witness around January 19, 2007. App. p. 4.

The circuit court misapprehended *Crawford*. It indicated that Petitioner did not disclose his position or opinion on the Crockett investigation. It defies logic based on the record that if one openly agrees to be a witness on behalf of a person claiming race discrimination, that such a stance suggests he or she favors the victim's position. At the very least, genuine issues of material fact have been created on this issue.

**When openly agreeing to be a witness, Petitioner, through his conduct, is making it known that he has the raw guts to stand up against the hiring authority by being a witness against it.** At the very least there is a genuine issue of material fact as to the meaning of Petitioner's conduct.

Petitioner was formally fired on February 12, 2007, App. p. 73, par. 14, after being listed as a witness on January 4, 2007 indicating proof of retaliation by temporal proximity; however there is more: Never produced by the County was a mysterious Christmas Day 2006 memo, written by Petitioner's supervisor, Tim Hochuli, alleging purported non compliance with instructions; App. p. 72, par. 11, *yet another genuine issue of material fact* overlooked by the courts blow upon which a reasonable jury could conclude that retaliation occurred or pretext was present for the decision to terminate Petitioner in late January 2007.

## ARGUMENT

## FIRST AMENDMENT RETALIATION CLAIM

The very same logic applies to Petitioner's First Amendment retaliation claim, given that he volunteered to be a witness and there is no evidence that he was acting pursuant to his official duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006). Coming forth as a witness can be considered speech on a matter of public concern. *See generally Konits v. Valley Stream High School, et al.*, 394 F.3d 121 (2nd Cir. 2005). "If Konits can prove that being

so identified [as a witness] was a partial motivation for the retaliation she alleges she suffered, then her First Amendment claim would certainly lie." "By our decision today, we resolve this split [amongst the district courts] that any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or *potential* witnesses in proceedings addressing discrimination claims can give rise to a cause of action under 42 U.S.C. Sec. 1983." *Id.* at 125 (emphasis added). Also, filing the instant lawsuit, *infra*, is clearly a matter of public concern as it involves a matter of discrimination or agreeing openly to be a witness on a fellow employee's discrimination claim. *Id.* Apparently the Eleventh Circuit minimizes such speech and regards its status as far less protected.

## A CONFLICT EXISTS AMONG CIRCUITS AS TO THE INTERPRETATION OF *CRAWFORD*

In the case at bar, the Eleventh Circuit panel held post-*Crawford* that " . . . simply being listed as a witness on an internal complaint form, without actively volunteering to serve as a witness or offering some indication of the nature of the proposed testimony does not constitute 'opposition' under Title VII." The First Circuit Court of Appeals in a decision since *Crawford*, specifically opined that "nothing in *Crawford* or Title VII's anti-retaliation provision suggests that employees engage in protected conduct only when they *verbally* communicate their opposition to unlawful employment practices." *See Collazo v. Bristol Myers Squibb*, Case No. 09-1665 (1st Cir. Aug. 5, 2010) (emphasis in original). By disclosing his

willingness to be a witness for Ms. Crockett, Petitioner took a stand against discriminatory practices, by "standing pat," and not necessarily saying or doing more. *Id.* (*quoting Crawford*, 129 S. Ct. at 851).

The Sixth Circuit is still adjusting – to the detriment of plaintiffs – to this Court's abrogation of circuit law through *Crawford*, as a recent full *en banc* case drew substantial dissent. *See Thompson v. North American Stainless*, 567 F.3d 804 (6th Cir. 2009) Unlike the majority view, one of the dissenting judges noted that after *Crawford*, "oppose" includes silent opposition; there is no requirement to shout one's opinion from the rooftops. *Id.* at 818 (Boyce, Jr., J., dissenting). This Court called the lower Court's opinion in *Crawford* "freakish" in its interpretation of the opposition clause. *Id.* at 823 (Nelson Moore, J., dissenting).

## THE PANEL BELOW ERRED IN RULING THE MAGISTRATE DID NOT HAVE TO RECUSE HIMSELF

The undersigned questioned at hearing *ex parte* contacts between opposing counsel and the magistrate's law clerk on when discovery could begin (absent discovery order that was purportedly in the works and "all open matters." App. pp. 60-64. Instead of support of policing confidence in the judicial system through recusal, the magistrate chastised the undersigned saying repeatedly that he *did not care*. Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. *See Liteky v. U.S.*, 114 S. Ct. 1147, 1162

(1994). No objective observer, including the circuit panel, could condone the behavior of the magistrate.

The working relationship between a judge and his or her law clerk, is unique, *Sheppard v. Beerman*, 18 F.3d 147, 152 (2nd Cir. 1994). Unlike a typical employment relationship where an employer may want to limit the information she wants to share with his or her employees, in order for chambers to function efficiently, an absolute free flow of information between the clerk and the judge is usually necessary. *Id.* More importantly, clerks regularly have access to the judge's confidential thoughts on a case. *Id.* The judge may discuss his or her feelings with the law clerk, or allow the law clerk access to the judge's personal notes and vice-versa. *Id.* With these thoughts in mind, it is apparent why Appellant would have such deep concern about the conversation described, *supra*. Inexplicably, neither court took notice of this on-point opinion. *Additionally, this email exchange took place just the month prior to the district court dismissing Count I.*

Other questionable acts of bias occurred when the magistrate criticized counsel for already having amended his complaint three times, yet later criticized counsel for not amending his complaint again to include retaliation for filing the instant lawsuit. *Additionally, the assistant county attorney, Sarah Schenk, circulated an email indicating Petitioner was fired at a time he actually was not, yet neither court took notice of such flagrant motive of animus by Respondent to retaliate against Petitioner*; a rush to

judgment if there ever was one. App. pp. 73-74, par. 14.

## THE PANEL BELOW IGNORED THE JURISPRUDENCE OF THIS COURT AS TO WHETHER PETITIONER SHOULD BE ALLOWED TO PLEAD RETALIATION FOR FILING THE INSTANT LAWSUIT

At oral argument on summary judgment, Petitioner vociferously argued that the issue of retaliation was actually being litigated in the case, referred to Supreme Court precedent (*Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 998 (2002)) but the district court without citation opined what it believed to be new strict rules of pleading laid down by the Supreme Court. The circuit court agreed; however, what should count are common sense and a dose of reality.

The best evidence the parties knew the issue of whether the filing of the instant lawsuit was a basis for retaliation and was in fact being litigated, is in Respondent's own summary judgment motion where Respondent states: **"What is relevant to Thampi's allegations is whether or not Manatee officials knew Thampi's protected activity of filing the lawsuit, and whether they then gave 'false and defamatory' information in retaliation for filing the suit."** (emphasis added). App. p. 82. Respondent clearly knew Petitioner was claiming retaliation for filing the lawsuit. Respondent was put on notice

that the matter was being litigated and openly accepted it without objection as a matter to be litigated, but the lower courts missed it entirely.

Also raised in the litigation below is that Petitioner applied for four hundred (400) job openings with various government entities, participated in nearly fifty (50) interviews, and had job offers withdrawn, which shows the enormity of the harm inflicted on this individual. App. p. 77, par. 22. If allowed to stand, this harm is a threat to others nationally.

Here the Eleventh Circuit is not only in conflict with common sense, it conflicts with the Eighth Circuit. *See Sherpell v. Humnoke School Dist. No. 5 of Lonoke County*, 674 F.2d 536 (5th Cir. 1989). A plaintiff's failure to plead in specific detail the retaliation charge is not fatal when viewed in the totality of the circumstances. *Id.* In the case-at-bar, the matter was obviously known to all parties in the litigation, *supra*, throughout the summary judgment process and in discovery. *Id.*

## CONCLUSION

The circuit court panel's decision runs counter to the strong national public policy of private enforcement of our civil rights laws. Both the district court and the circuit panel took great pains to find hypertechnical defects, which defeat this policy: so-called defects, which were just plain wrong or distorted in manner to warp the merits of the case. The court

should be finding every way possible to bolster civil rights protections to those most vulnerable in this country. The panel did not do so here.

Not allowing Petitioner to proceed on his claim of retaliation for filing the instant lawsuit defies logic and one is left wondering whether courts operate in reality . . . or whether the circuit court condones the treatment by the magistrate and his apparent indifference to *ex parte* conversations with chambers by opposing counsel. The bottom line: Petitioner's confidence in the judicial system has been shattered and we ask for the help of this High Court in making things right. Confidence in the judicial system is an issue of national import of the highest order.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 09-16139
Non-Argument Calendar

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D. C. Docket No. 07-01445-CV-T-30-TGW

MOHAN THAMPI,

Plaintiff-Appellant,

versus

MANATEE COUNTY
BOARD OF COMMISSIONERS,
as the body corporate governing
Manatee County,

Defendant-Appellee.

---

Appeal from the United States District Court
for the Middle District of Florida

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(June 30, 2010)

Before BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

Mohan Thampi appeals the magistrate judge's grant of summary judgment in favor of Manatee

County Board of Commissioners ("Manatee").[1] Thampi argues that the magistrate erred by (1) finding that he failed to properly plead his claim that Manatee retaliated against him for filing the instant lawsuit, (2) finding that being listed as a potential witness in an internal discrimination investigation did not constitute speech protected by the First Amendment or activity protected by Title VII's opposition clause, and (3) failing to recuse himself pursuant to 28 U.S.C. § 455. For the reasons set forth below, we affirm.

## I.

Thampi, who was employed as Manatee's Projects and Engineering Manager, was terminated on February 12, 2007, by his supervisor, Tim Hochuli. Thampi filed a third amended complaint against Manatee, asserting a procedural due process claim ("Count 1"), a First Amendment retaliation claim ("Count 2"), and a Title VII retaliation claim ("Count 3"). Counts 2 and 3 were based on Thampi's allegation that he was terminated because he was listed as a witness in an internal discrimination complaint filed by a former co-worker, Delores Crockett. Thampi also alleged that, "in further retaliation for . . . exercis[ing] his First Amendment rights for being a witness . . . [Manatee] used derogatory, false, and/or distorted information designed to derail [his] job offer

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[1] The parties consented to have all dispositive motions resolved by a magistrate judge.

with Sarasota County." In response to a motion for summary judgment filed by Manatee, the magistrate dismissed Count 1.

Thampi filed a motion to compel discovery, asserting that Manatee had failed to respond to his discovery requests and engaged in an *ex parte* communication with the magistrate's law clerk. At a case management conference, the magistrate stated that communications with a law clerk do not "mean anything," and that "the only thing that counts" was a written order. Thampi's counsel requested an additional 90 days to file amendments to the pleadings, which the magistrate granted after stating that he "d[id not] care" that Thampi should have received discovery earlier. The magistrate also granted, in part, Thampi's motion to compel discovery.

Manatee filed a motion for summary judgment with respect to Counts 2 and 3 of Thampi's third amended complaint. Manatee argued that simply being listed as a possible witness on an internal complaint did not constitute "speech" for First Amendment purposes or "opposition" under Title VII. Manatee acknowledged that it provided reference information to Sarasota County ("Sarasota"), but it contended that the two employees who served as references for Thampi had no knowledge of Thampi's lawsuit when they provided the references, and it provided Thampi's personnel records in response to a public records request.

The evidence showed that Thampi was listed as a witness in a January 19, 2007, internal discrimination complaint that Crockett had filed against Hochuli. A February 2, 2007, notice sent to Hochuli stated that an employee in his department had filed a complaint of illegal harassment or discrimination, but did not identify the complainant or any witnesses. On March 1, 2007, Thampi provided a statement to Manatee's human resources investigators in connection with the Crockett investigation.

Thampi stated that Crockett informed him around January 4, 2007, that she had listed him as a witness in her discrimination complaint against Hochuli. Thampi told Crockett "try to leave me out of this," although he subsequently agreed to allow Crockett to list him as a witness. Hochuli stated that he had never seen Crockett's complaint, but he received a final report, which contained a list of witnesses, including Thampi. Dale Garcia, Manatee's Senior Human Resources Manager, never informed Hochuli who Crockett had listed as a witness in her complaint, and Garry Dye, Manatee's Director of Human Resources, never discussed Crockett's complaint with anyone outside of human resources.

Dan Gray and John Zimmerman stated that Jody Kirkman, an employee of Sarasota, called them in September 2007, because Thampi had listed them as professional references. When they spoke with Kirkman, neither Gray nor Zimmerman were aware that Thampi had filed a lawsuit against Manatee. Kirkman stated that he obtained Thampi's personnel

files from Manatee and recalled seeing a "Google search" printout that referenced a lawsuit Thampi had filed against Manatee. Kirkman did not know whether the Google search was conducted by Manatee's or Sarasota's human resources department.

Thampi filed a motion for partial summary judgment, arguing that his "participation as a witness" in the Crockett investigation constituted "speech" protected by the First Amendment. Thampi stated that his speech involved a matter of public concern, because it involved racial discrimination by a governmental body. Thampi contended that a causal connection between his being listed as a witness and his termination was established by temporal proximity and the fact that Manatee's human resources employees knew about his status as a witness in the Crockett complaint. Thampi contended that Manatee took adverse employment actions against him because he served as a witness in the Crockett investigation, filed an EEOC charge, and filed the instant lawsuit.

The magistrate granted Manatee's motion for summary judgment. The magistrate found that Thampi did not engage in speech protected by the First Amendment because Thampi did not intend to speak when his name was placed on Crockett's internal complaint form. He noted that, even if Thampi did speak, the speech was not "on a matter of public concern." The magistrate also pointed out that there was no evidence that Hochuli was aware of Thampi's

connection to Crockett's complaint when Thampi was terminated.

The magistrate noted that Thampi mentioned in his response to Manatee's motion for summary judgment that Manatee retaliated against him for filing the instant lawsuit; however, he declined to consider this claim, because it was not set forth in Thampi's third amended complaint and, therefore, was not properly pled. Based on these findings, the magistrate dismissed Count 2 of Thampi's third amended complaint.

With respect to Thampi's Title VII retaliation claim, the magistrate found that simply being listed as a witness in Crockett's discrimination complaint did not fall within the scope of Title VII's opposition clause. The magistrate further found that Thampi failed to show a causal connection between his termination and his being listed as a witness, because there was no evidence that Hochuli was aware of Thampi's status as a witness when he terminated Thampi. The magistrate again noted that Thampi abandoned any claim that Manatee retaliated against him based on the filing of the instant lawsuit, because he failed to raise this claim in his third amended complaint. Accordingly, the magistrate granted Manatee's motion for summary judgment and dismissed Counts II and III of Thampi's third amended complaint.

## II.

### A. *Retaliation Claims Based on the Filing of the Instant Lawsuit*

"[We] review[ ] a district court's grant of summary judgment *de novo*." *Galvez v. Bruce,* 552 F.3d 1238, 1241 (11th Cir. 2008). "Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of fact and compels judgment as a matter of law." *Swisher Intern., Inc. v. Schafer,* 550 F.3d 1046, 1050 (11th Cir. 2008), *cert. denied*, 130 S.Ct. 71 (2009); Fed.R.Civ.P. 56(c).

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief," and "[e]ach allegation must be simple, concise, and direct." Fed.R.Civ.P. 8(a)(2), (d)(1). Recently, we have recognized a tightening of liberal pleading standards, such that "a complaint must now contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *American Dental Ass'n v. Cigna Corp.,* No. 09-12033, manuscript op. at 10 (11th Cir. May 14, 2010), quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007); compare *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514, 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002) (finding that the petitioner's complaint satisfied Rule 8(a)'s pleading requirements "because it g[ave] respondent fair notice of the basis for petitioner's claims"). However, even the liberal pleading standard set forth in *Swierkiewicz* "does not

afford plaintiffs with an opportunity to raise new claims at the summary judgment stage." *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004). "A plaintiff may not amend her complaint through argument in a brief opposing summary judgment." *Id.* at 1315.

A review of Thampi's third amended complaint shows that Thampi failed to allege retaliation based on the filing of his lawsuit. In fact, Thampi alleged in his third amended complaint that Manatee provided false and damaging information to Sarasota in retaliation "for being a witness." If Thampi believed that Manatee had provided this information in retaliation for filing his lawsuit, he could have included this in the third amended complaint. Thampi's third amended complaint fails to satisfy even the liberal pleading requirement of *Swierkiewicz,* because it fails to give Manatee any notice that Thampi will be pursuing a claim of retaliation based on the filing of the lawsuit. *See Swierkiewicz,* 534 U.S. at 514, 122 S.Ct. at 998. Even Thampi's motion for leave to file his third amended complaint contains no mention of retaliation based on the filing of the instant lawsuit. Furthermore, although Thampi raised the issue in his memorandum of law in support of his motion for summary judgment, new claims may not be raised at the summary judgment stage, unless the plaintiff seeks to amend his complaint in accordance with Rule 15(a). *See Gilmour,* 382 F.3d at 1314-1315. Thampi contends that the district court should have allowed him to pursue his claims of retaliation based on the

filing of the lawsuit, because Manatee responded to the merits of the claims. However, Thampi cites no case law in support of this assertion, and *Gilmour* specifically provides that plaintiffs may not raise new claims at the summary judgment stage. *See Gilmour,* 382 F.3d at 1314-15. Accordingly, because Thampi never amended his complaint to include a claim of retaliation based on the filing of his lawsuit, such a claim was not properly pled, and the magistrate did not err in granting summary judgment in favor of Manatee on this claim.

*B. Retaliation Claims Based on Thampi Being Listed as a Witness*

As an initial matter, Thampi's argument focuses on whether his being listed as a witness in Crockett's complaint constituted protected speech under the First Amendment or protected conduct under Title VII. Thampi fails to argue and, therefore, has abandoned any argument, that he was retaliated against based on the actual statements he provided to investigators in March 2007. *See Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 972 (11th Cir. 2008) ("It is well settled in this circuit that an argument not included in the appellant's opening brief is deemed abandoned"). Thampi has also abandoned any claim that his being listed as a witness in Crockett's internal complaint constitutes protected activity under Title VII's participation clause. *See Davis,* 516 F.3d at 572.

*i. First Amendment Retaliation*

To prevail on a First Amendment retaliation claim, "a plaintiff must establish first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech." *Bennett v. Hendrix,* 423 F.3d 1247, 1250 (11th Cir. 2005). For an employee's speech to warrant First Amendment protection, "the employee must have (1) spoken as a citizen and (2) addressed matters of public concern." *Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir. 2007). "Deciding whether a government employee's speech relates to his or her job as opposed to an issue of public concern must be determined by the content, form, and context of a given statement." *Id.* at 1343 (quotation omitted). We have held that, where an employee's concerns about sexual harassment focused on the conditions of her own employment and were not spoken in public, but instead, were made in the form of a complaint to an official body, the speech was not a matter of public concern. *See Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993).

Thampi's being listed as a witness in Crockett's complaint does not constitute speech protected by the First Amendment for two reasons. First, Thampi did not "speak" on any matter. When he was informed that Crockett had listed him as a witness, Thampi did not express any opinion on the merits of

Crockett's complaint or indicate what he would tell investigators. In fact, he initially asked Crockett to "leave [him] out of this." Second, even if simply being listed as a witness constituted "speech," it is impossible to say that the speech was on an issue of public concern. *Boyce* instructs courts to examine the content, form, and context of a given statement to determine if the speech involves an issue of public concern. *See Boyce,* 510 F.3d at 1343. Here, there is no content, form, or context to examine, because Thampi had not spoken at the time that he was terminated. Even if one could assume that Thampi would testify in Crockett's favor, the testimony would be given in private and would focus on a co-worker's conditions of employment. Thus, the speech would not involve a matter of public concern. *See Morgan*, 6 F.3d at 755.

Thampi would not be entitled to relief on his First Amendment retaliation claim, even if his being listed as a witness constituted speech protected by the First Amendment, because he failed to show that he was terminated in retaliation for his willingness to serve as a witness in the Crockett investigation. *See Bennett,* 423 F.3d at 1250. In his deposition, Hochuli stated that he had never seen Crockett's complaint, although he received a final report containing a list of witnesses. This final report would not have been compiled until well after Thampi was terminated, as the investigation into the complaint continued at least through March 2007, when Thampi was interviewed by investigators. Furthermore, Garcia and Dye both stated that they never informed Hochuli of

the identity of the witnesses listed in the Crockett complaint. Thampi cites no evidence rebutting these statements. Accordingly, because Thampi's being listed as a witness does not appear to constitute "speech" protected by the First Amendment, and because Thampi failed to establish a causal connection between his being listed as a witness and his termination, the magistrate did not err in granting Manatee's motion for summary judgment on Thampi's First Amendment retaliation claim. *See Bennett*, 423 F.3d at 1250.

*ii. Title VII's Opposition Clause*

Under Title VII's opposition clause, an employer may not retaliate against an employee because the employee has opposed an unlawful employment practice. *EEOC v. Total Sys. Serv., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *see* 42 U.S.C. § 2000e-3(a). To establish a *prima facie* case of retaliation under Title VII, a plaintiff may show that: (1) he participated in an activity protected by Title VII; (2) he suffered an adverse employment action; and (3) there was a causal connection between the participation in the protected activity and the adverse employment decision. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). "To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated." *Shannon v. BellSouth Telecomm., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002). Close

proximity in time between the protected activity and the adverse employment action "is insufficient to create a genuine issue of fact as to causal connection when there is unrebutted evidence that the decision-maker did not have knowledge that the employee engaged in protected conduct." *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000).

Manatee does not dispute that Thampi's termination constituted an adverse employment action. However, Thampi has not engaged in activity protected by Title VII's opposition clause. Thampi at first protested being listed as a witness, asking Crockett to "try to leave [him] out of this," although he eventually agreed to the listing. Furthermore, there is no evidence that Thampi, at any time prior to his termination, told Crockett or any other Manatee employee the nature of his proposed testimony. Although "opposition" does not require "active, consistent behavior," it requires at least the disclosure of an individual's position or opinion on a matter. *Crawford v. Metro. Gov't of Nashville and Davidson County*, 555 U.S. ___, 129 S.Ct. 846, 851, 172 L.Ed.2d 650 (2009) (holding that "'[o]ppose' goes beyond 'active, consistent' behavior" and includes instances in which an individual "has taken no action at all to advance a position *beyond disclosing it*") (emphasis added). Thus, simply being listed as a witness on an internal complaint form, without actively volunteering to serve as a witness or offering some indication of the nature of the proposed testimony does not constitute "opposition" under Title VII.

Nevertheless, even if Thampi's being listed as a witness on Crockett's complaint constituted "opposition," he has failed to establish a *prima facie* case of retaliation, because he failed to show a causal connection between his being listed as a witness and his termination. *See Crawford,* 529 F.3d at 970. Although Thampi was terminated only weeks after he was listed as a witness, he presented no evidence establishing that Hochuli knew, when he terminated Thampi, that Thampi was listed as a witness in Crockett's complaint. *See Shannon,* 292 F.3d at 716; *Brungart,* 231 F.3d at 799. As discussed above, all of the evidence submitted to the magistrate indicates that Hochuli was unaware that Thampi was listed as a witness at the time he terminated Thampi. Because Thampi has failed to show a causal connection between his being listed as a witness in Crockett's complaint and his termination, he failed to establish a *prima facie* case of retaliation under Title VII. Accordingly, the magistrate did not err in granting summary judgment in favor of Manatee on this claim.

*C. Magistrate's Failure to Recuse*

Generally, we review a magistrate's decision not to recuse himself under 28 U.S.C. § 455 for an abuse of discretion. *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1319-20 (11th Cir. 2002). However, where a party fails to seek recusal of the magistrate in the district court, we review the magistrate's decision not to recuse himself for plain error. *Hamm v. Members of Bd. of Regents of State of Fla.*, 708 F.2d

647, 651 (11th Cir. 1983). Under plain error review, the party raising the issue has the burden to show that (1) there is error (2) that is plain (3) that affects a defendant's substantial rights and (4) "not correcting the error would seriously affect the fairness of the judicial proceeding." *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999).

Under 28 U.S.C. § 455, a magistrate should disqualify himself if his "impartiality might reasonably be questioned," or if the magistrate "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a), (b)(1). "The general rule is that bias sufficient to disqualify a judge must stem from extrajudicial sources . . . and must be focused against a party to the proceeding." *Hamm,* 708 F.2d at 651. "An exception to that rule is made when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party." *Id.* "Neither a trial judge's comments on lack of evidence, rulings adverse to a party, nor friction between the court and counsel constitute pervasive bias." *Id.*

As an initial matter, because Thampi did not seek recusal of the magistrate judge, we review Thampi's bias argument for plain error. *See Hamm*, 708 F.2d at 651. Thampi's claims of bias rest upon (1) Manatee's *ex parte* communication with the magistrate's law clerk, and (2) the magistrate's "hostile" statements made at the case management conference. Thampi's claims fail for several reasons. First, Thampi cites no binding case law providing that a

magistrate must recuse himself if one party engages in an *ex parte* communication with the magistrate's law clerk. *See United States v. LeCroy*, 441 F.3d 914, 930-31 (11th Cir. 2006) (providing that an error is not plain if there is no relevant case law). Second, the magistrate's comments at the case management conference did not "demonstrate . . . pervasive bias and prejudice." *See Hamm,* 708 F.2d at 651. Thampi cites two instances in which the court responded "I don't care" and "I don't really care" when his attorney stated that he had been put at a disadvantage. However, two comments demonstrating "friction between the court and counsel" do not constitute "pervasive bias." *See id.* Finally, Thampi failed to show that either of the two alleged errors affected his substantial rights. *See Farley,* 197 F.3d at 1329. The magistrate's comments at the case management conference were made in response to Thampi's request for a 90-day extension of the period in which to file amendments. Ultimately, the magistrate granted this request. The magistrate also granted, in part, Thampi's motion to compel discovery, ordering that Manatee provide the discovery Thampi had requested. Thampi does not allege that he was prejudiced by any of the magistrate's rulings. Accordingly, the magistrate did not plainly err in failing to recuse himself, and we affirm the grant of summary judgment in Manatee's favor.

**AFFIRMED.**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MOHAN THAMPI,

Plaintiff,

v.

MANATEE COUNTY BOARD OF COMMISSIONERS,

Defendant.

CASE No. 8:07-CV-1445-T-TGW

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ORDER

(Filed Nov. 9, 2009)

The plaintiff alleges that his termination from his employment with Manatee County was in retaliation for exercising rights under the First Amendment and Title VII. The defendant has filed a motion for summary judgment as to the plaintiff's First Amendment and Title VII retaliation claims in counts II and III of his third amended complaint (Doc. 59). The plaintiff also filed a motion for partial summary judgment as to counts II and III (Doc. 60). Each retaliation claim has multiple deficiencies. Accordingly, the defendant's motion for summary judgment will be granted.

I.

The plaintiff, Mohan Thampi, was employed by the defendant, Manatee County Board of Commissioners

("County"), as projects and engineering division manager from July 6, 2004, until he was terminated on February 12, 2007 (Doc. 59, pp. 2, 13). The plaintiff was hired by, and reported directly to, Tim Hochuli, department director of the project management department ("PMD") (*id.*, pp. 2-3). PMD is responsible for contract negotiations and engineering and construction projects, many valued from the millions to tens-of-millions of dollars, including capital improvement activity and various public maintenance and infrastructure projects (*id.*, p. 2).

As projects and engineering manager, Thampi directed the largest division of PMD, overseeing 45 employees (*id.*, p. 3). His department was responsible for the operational areas of project management, plan review, survey, locates, records, and engineering design (*id.*, p. 4).

In July 2005, Thampi first received a negative performance evaluation from his director (Doc. 59-3, pp. 5-7). Hochuli concluded that Thampi, despite being given additional resources, was unable to decrease the time taken for development review (*id.*, p. 6). Thampi was evaluated again by Hochuli a year later, who determined that Thampi was performing to the minimal standards and failed to meet expectations in the managerial category (*id.*, pp. 12-13). Among other things, Hochuli faulted Thampi for untimely responses, over-delegation of his workload, and the failure to establish deadlines for his staff (*id.*, p. 12). Hochuli directed Thampi to outline a

tracking plan to reduce the time for plan review and to establish deadlines for staff (*id.*, p. 13).

Approximately one month after the July 2006 evaluation, Hochuli issued Thampi a warning for failure to provide "specific and accurate comments" and "to follow up on projects that were nearing their completion date" (*id.*, p. 16). In addition, Thampi received a Notice of Disciplinary Action for insubordination because he had failed to establish development review deadlines and tracking for his staff (*id.*, p. 19).

During this period, Thampi was also reprimanded several times for unprofessional behavior. After two prior oral warnings, Thampi, on December 22, 2005, was issued a written warning by Hochuli for tardiness and accessing internet sites for personal purposes (*id.*, pp. 8-9). Two months later, Hochuli formally disciplined Thampi for insubordination because he violated the County's computer policy again by visiting personal shopping and banking websites during duty hours (*id.*, pp. 10-11). Hochuli felt that, "[a]s a high-level manager, [Thampi] must be expected to follow County rules, set a proper example for his and other employees and follow the instructions of supervisors without continuous follow-up. I must be able to trust that my instructions will be followed by the high-level managers reporting to me" (*id.*, p. 10).

Approximately five months after Thampi's last discipline notice, Hochuli informed Thampi by pre-termination letter that he was being considered for

termination due to, among other reasons, incompetence, insubordination, inefficiency, and for conducting personal business during duty hours (*id.*, pp. 23-25). Thampi was placed on administrative leave on January 30, 2007, pending Hochuli's final decision (*id.*, p. 25). Thampi requested time to compose a response to the charges, which he submitted on February 2, 2007 (*id.*, pp. 26-33). Despite Thampi's eight-page rebuttal, the plaintiff was formally terminated on February 12, 2007 (*id.*, pp. 48-53).

Thampi appealed that decision pursuant to County procedures and requested a post-termination hearing, which was conducted before a hearing officer on May 10-11, 2007 (*id.*, p. 55). By an order dated July 18, 2007, the hearing officer recommended that the termination be upheld (*id.*, pp. 55-62). The County Administrator adopted that decision two days later (*id.*, p. 54).

The facts giving rise to this suit occurred two weeks before the January 30, 2007, pre-termination letter, when Thampi was named, unknowingly, as a witness in a fellow employee's internal discrimination complaint. Thampi contends that his inclusion on the witness list is the real reason he was terminated.

Specifically, Thampi's co-worker, Deloris Crockett, filed an internal complaint of discrimination on January 19, 2007, with the County's human resources ("HR") department (Doc. 59-4, pp. 7-8). Crockett, who is African-American, served as Hochuli's assistant until he changed her title and reassigned her to other

duties (*id.*, p. 24). Hochuli then replaced Crockett with his former assistant, Marlene Marlatt (*id.*, pp. 25-26). Consequently, Crockett filed, internally, a complaint of discrimination with the County.

Before consulting with Thampi, Crockett named the plaintiff as one of four witnesses to her January 19th complaint (*id.*, p. 8). On or about January 29, 2007, the day before the pre-termination letter was issued, Thampi spoke with Crockett for the first time about her complaint and agreed, somewhat reluctantly, to be a witness on her behalf (*id.*, p. 21). However, it was not until February 2, 2007, that the County's HR department provided to Hochuli official notice that a discrimination complaint had been filed by someone in his department. That notice did not identify either the complainant or the subject of the complaint (*id.*, pp. 14-15).

The County appointed an investigator to assess Crockett's internal discrimination complaint, and investigators questioned Thampi on March 1, 2007 (*id.*, pp. 16-21). The investigator concluded that there was no evidence of race discrimination, but suggested that Hochuli should have given Crockett more time and specific feedback on her performance before changing her title and duties (*id.*, p. 50). Crockett continues to work for the County as an administrative support coordinator (Doc. 59-12, p. 1).[1]

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[1] Citations to depositions refer to the page numbers at the top of each electronically-filed page, and not to the numbers located within each page.

Pertinently, Hochuli is a Major in the Army Reserves. He was issued orders related to the Iraq War and ceased working for the County on May 29, 2007 (Doc. 59-7, p. 10). He did not return to work for the County until after August 2008 (*id.*).

Subsequently, Thampi filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC"), alleging that the real reason he was terminated was retaliation for, among other things, being named as a witness by Crockett (Doc. 59, p. 14). After receiving a right-to-sue letter, plaintiff filed this suit in federal court in August 2007 (*id.*).

Thampi talked with Jody Kirkman, Sarasota County's utilities planning and regulatory manager, about employment around September 2007 (Doc. 59-15, pp. 4, 5). Kirkman offered Thampi a position as technical specialist 13, conditioned on a background check (*id.*, p. 4).[2] In connection with Thampi's background check, Kirkman spoke to Thampi's references, Manatee County utilities department director Dan Gray and utility manager John Zimmerman (*id.*, p. 6). Sarasota County also placed a public records request for Thampi's employment records from his previous employers, Manatee County and Collier County (*id.*, pp. 4, 8).

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[2] The plaintiff avers that he was offered a job by Kirkman in April 2007, but that a hiring freeze prevented his employment (Doc. 60-9, p. 2). Kirkman advised the plaintiff four months later that the freeze was lifted (*id.*, p. 3).

Kirkman gathered the records and placed them, along with Sarasota's papers on Thampi, in one file (*id.*, pp. 12-13). That file included a printout of a Google search, conducted on September 18, 2007, by an unknown individual, highlighting the plaintiff's current lawsuit against the defendant and a previous civil rights suit against Collier County (*id.*, pp. 10, 11). After the background check was completed, Kirkman rescinded the offer of employment to Thampi (*id.*, p. 4).

In this case, the parties have consented to the exercise of jurisdiction by a United States Magistrate Judge (Doc. 25). The case has proceeded to a third amended complaint that contains three counts (Doc. 39). Count I alleges a denial of procedural due process (*id.*, p. 2). That count has been dismissed on the County's motion for summary judgment on the grounds that the plaintiff was afforded due process in connection with his termination, and that the claim was foreclosed by *McKinney* v. *Pate*, 20 F.3d 1550 (11th Cir. 1994) (*en banc*), *cert. denied,* 513 U.S. 1110 (1995).

Count II alleges First Amendment retaliation and count III alleges Title VII retaliation (Doc. 39). The defendant has filed a motion for summary judgment with regard to the plaintiff's remaining claims in counts II and III (Doc. 59). The plaintiff then filed a partial motion for summary judgment (Doc. 60). A hearing was subsequently held on the motions.

II.

The court shall enter summary judgment only if the evidence shows "that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c). Material facts are those over which disputes "might affect the outcome of the suit under the governing law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes about material facts are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant bears the burden of establishing the absence of a dispute over material facts, *Reynolds* v. *Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993).

When the party opposing the summary judgment motion has the burden of proof at trial, the moving party may discharge its initial burden by identifying specific portions of the record which show the absence of evidence to prove the nonmoving party's case at trial, or, alternatively, it may come forward with "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *United States* v. *Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991). If the moving party does not meet its burden, then the motion for summary judgment will be denied. *Id.*

When the moving party meets its initial burden, the burden then shifts "to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark* v.

*Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). If the party opposing the motion is unable to make a sufficient showing on an element essential to its case on which it has the burden of proof at trial, the movant is entitled to summary judgment. *United States* v. *Four Parcels of Real Property, supra,* 941 F.2d at 1438.

When the party moving for summary judgment has the burden of proof at trial, it must affirmatively show the absence of a genuine issue of material fact by presenting credible evidence that would entitle it to a directed verdict if the evidence was not controverted at trial. *Id.* If the moving party does not meet its burden, then the motion for summary judgment will be denied. *Id.* at 1437-38. If the movant meets its initial burden, then it is entitled to summary judgment unless the nonmoving party comes forward with "significant probative evidence demonstrating the existence of a triable issue of fact." *Id.* at 1438.

In determining whether the moving party should be awarded summary judgment, the court must view the evidence and factual inferences therefrom in the light most favorable to the opposing party. *Reynolds* v. *Bridgestone/Firestone, Inc., supra,* 989 F.2d at 469. Any reasonable doubts about the facts are to be resolved in favor of the party opposing the motion for summary judgment. *Id.*

In count II, the plaintiff alleges that the County retaliated against him for exercising his right to freedom of speech (Doc. 39, pp. 5-9). It is well established

that a public employer may not retaliate against an employee for protected speech. *Brochu* v. *City of Riviera Beach,* 304 F.3d 1144, 1157 (11th Cir. 2002).

The plaintiff's claim has two aspects: (1) the termination of the plaintiff's employment; and (2) the alleged interference with the plaintiff's Sarasota job opportunity. Unfortunately, the plaintiff is vague about his alleged protected activities. Consequently, it is necessary to address alternative scenarios.

A. The County perceives the plaintiff's retaliation claim regarding his termination to be predicated upon Crockett's listing him on the County's discrimination complaint form as one of four witnesses (Doc. 59, p. 16). This is reasonable since count II of the third amended complaint does not specify any other alleged protected activity (*see* Doc. 39, ¶ 33). Moreover, in the response to the County's summary judgment motion, the plaintiff does not dispute that he is asserting such a claim (*see* Doc. 64, pp. 2-6).

However, as the County persuasively argues, when Crockett simply placed the plaintiff's name on a form, the plaintiff was not engaging in speech. The First Amendment guarantees individuals the right to engage in speech, including expressive conduct. *See Texas* v. *Johnson,* 491 U.S. 397 (1989). Whether conduct is expressive is determined by whether the actor had an intent to convey a particularized message in his conduct, and whether a reasonable person would interpret the actor's conduct as conveying some message. *Holloman ex rel. Holloman* v. *Harland*,

370 F.3d 1252, 1270 (11th Cir. 2004). Moreover, "speech which has not yet occurred . . . , for First Amendment retaliation purposes, is no speech at all." *Wernsing* v. *Thompson,* 423 F.3d 732, 752 (7th Cir. 2005).

Here, Thampi did not even attempt to speak about Crockett's complaint at the time it was filed because he was not aware of Crockett's complaint (Doc. 59-8, p. 15). Consequently, Crockett's listing of Thampi as a witness could not constitute protected activity by Thampi since Thampi did not engage in any activity at all. Furthermore, Thampi did not have any intent to speak. Therefore, the plaintiff cannot base a First Amendment retaliation claim upon Crockett's listing of him as a witness without his knowledge (and even if he could, the claim would fail for other reasons soon to be discussed).

The plaintiff has said that Crockett told him on the day before he received his pre-termination letter of January 30, 2007, that she had filed a discrimination complaint and listed him as a witness (Doc. 59-4, p. 21). Arguably, this meeting could have produced protected speech, although the plaintiff does not clearly develop any such contention. Moreover, when asked by Crockett if he had any objections to being a witness, Thampi testified that he "went ahead and said, yeah" and told Crockett to "try to leave me out of this because – self preservation" (Doc. 59-8, pp. 15-16). Under these circumstances, there is plainly a legal question whether the plaintiff had engaged in protected speech at the time the termination process

began. It is unnecessary to explore that issue, however, because the First Amendment retaliation claim regarding termination fails on other elements.

The Eleventh Circuit has recognized a four-step test to determine whether a public employer has retaliated against an employee for that individual's exercise of the right to free speech. Those four inquiries are: (1) whether the speech may be "fairly characterized as constituting speech on a matter of public concern"; (2) if so, whether the employee's First Amendment interests outweighed the interest of the employer in preserving the efficiency of government services; (3) whether, in that event, the employee's expression was a substantial motivating factor in the government's discharge decision; and (4) if the employee has made such a showing, whether the public employer can prove that it would have taken the same employment action even in the absence of the protected conduct. *Brochu* v. *City of Riviera Beach, supra,* 304 F.3d at 1157.

To fall within the scope of "public concern," the employee's speech must relate to a matter of political, social, or other concern to the community. *Connick* v. *Myers,* 461 U.S. 138, 146 (1983). A fundamental question in making this assessment is whether the employee was speaking as a citizen on behalf of the public, or to further his own private interests. *Morgan* v. *Ford,* 6 F.3d 750, 754 (11th Cir. 1993), *cert. denied,* 512 U.S. 1221 (1994). This requires an analysis of the content, form, and context of a given statement, as revealed by the whole record. *Id.*

Additionally, since "an employee's speech will rarely be entirely private or entirely public," it is "the 'main thrust' of the employee's speech" that governs this determination. *Maggio* v. *Sipple,* 211 F.3d 1346, 1352 (11th Cir. 2000) (quoting *Morgan* v. *Ford, supra,* 6 F.3d at 755).

The Supreme Court has subsequently in *Garcetti* v. *Ceballos,* 547 U.S. 410 (2006), shed additional light on the law in this area. The Supreme Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Thus, "[i]n *Garcetti,* the Supreme Court emphasized that a public employee must speak both on a matter of public concern and as a citizen to be protected under the First Amendment." *D'Angelo* v. *School Board of Polk County, Florida,* 497 F.3d 1203, 1209 (11th Cir. 2007). Importantly, both of these factors are matters of law for the court to decide. *See Boyce* v. *Andrew,* 510 F.3d 1333, 1342 n.12 (11th Cir. 2007).

The plaintiff has the burden of proving as a threshold matter that he spoke as a citizen rather than as a public employee. *Abdur-Rahman* v. *Walker,* 567 F.3d 1278, 1281-82 (11th Cir. 2009). Where, as here, the employee's putative speech was not part of his official duties, "[t]he [Supreme] Court identified as relevant two factors that, considered in isolation, are not dispositive: first, whether the speech occurs in the workplace; and second, whether the speech

concerns the subject matter of the employee's job." *Id.* at 1282.

The threshold requirement that an individual speak as a citizen, and not an employee, defeats the claim based upon the mere listing of the plaintiff on Crockett's complaint because, assuming by some stretch of the imagination, that the plaintiff spoke, he did so as an employee obligated to cooperate with the investigation. Similarly, the claim (if there is one) that the County retaliated against the plaintiff for speaking with Crockett the day before the pre-termination letter fails since, if the plaintiff was engaging in protected activity at all, he was doing so as an employee, and not a citizen.[3] In addition, the plaintiff's First Amendment retaliation claim regarding termination cannot satisfy the requirement that speech be on a matter of public concern. Whether speech is on a matter of public concern is a question of law "readily susceptible to disposition on summary judgment." *Ferrara* v. *Mills,* 781 F.2d 1508, 1515 (11th Cir. 1986). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices." *Connick* v. *Myers, supra,* 461 U.S. at 146. As indicated, statements are analyzed

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[3] The plaintiff spoke with HR investigators about the Crockett complaint on March 1, 2007 (Doc. 59-4, pp. 16-21). By that time, the plaintiff had been terminated. Obviously, that activity could not be the basis for a retaliatory termination.

based on the content, the form, and the context of the entire record. *Martinez* v. *City of Opa-Locka,* 971 F.2d 708, 712 (11th Cir. 1992).

Various considerations have been identified as pertinent to an assessment whether a statement involves a matter of public concern. Thus, the motivation for an employee's speech is relevant to the public concern inquiry. *Goffer* v. *Marbury,* 956 F.2d 1045, 1049 (11th Cir. 1992). In addition, the fact that the information may be of general interest to the public is not dispositive. *Morris* v. *Crow,* 142 F.3d 1379, 1381-82 (11th Cir. 1998). Whether the speech is publically [sic] disseminated, while not required, can be a significant factor in this analysis. *Morgan* v. *Ford, supra,* 6 F.3d at 754 n. 5. But even if the public had some interest, that would not be enough to sustain a First Amendment claim. "The fact that . . . information may be of general interest to the public . . . does not alone make it of 'public concern' for First Amendment purposes." *Morris* v. *Crow, supra,* 142 F.3d at 1381-82.

Thampi contends, in a conclusory manner, that he spoke "*not for his own personal benefit,* but to help ensure the equality in the treatment of all employees in the workplace" (Doc. 64, p. 3) (emphasis in original). Moreover, at the hearing, Thampi argued that he agreed to testify because he was concerned about "rooting out racial discrimination" and "vindicating the civil rights of another."

However, Crockett's complaint was simply a personal grievance about an employment matter. Thampi's

statements to Crockett occurred as a private conversation, in Thampi's office, and concerned the working conditions of his co-worker. Thampi was reluctant to participate and he even asked Crockett to "leave me out of this" (Doc. 59-8, p. 15).

Also, there is no evidence of a relevant public debate on racism at that time among County employees. Moreover, the grievance investigation was not a matter that was open to the public. Further, the plaintiff did not attempt to engage the public on the issue. *Morgan* v. *Ford, supra.*

These circumstances establish that Crockett's grievance was not a matter of public concern. Indeed, it is doubtful that the public would even have any interest in the matter. The fact that Crockett was alleging discrimination does not convert the personal employment grievance into a matter of public concern. *Id.* at 754-55. Moreover, an internal dispute does not become a matter of public concern simply because it involves the way a public institution is managed. *Ferrara* v. *Mills, supra,* 781 F.2d at 1516. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Connick* v. *Myers, supra,* 461 U.S. at 149.

Therefore, to the extent that the plaintiff was even speaking about Crockett's complaint prior to his termination, his First Amendment claim regarding

termination fails at the threshold. Thus, he did not show that he spoke as a private citizen, and not an employee, and that his speech addressed a matter of public concern.

There is an additional reason why the plaintiff's claim fails. Even assuming the plaintiff spoke as a citizen on a matter of public concern when he agreed to be kept as a witness on Crockett's list, the plaintiff has not shown that the decisionmaker, Hochuli, knew about Crockett's claim, and the plaintiff's involvement in it, at the time of the termination. It is established, as well as obvious common sense, that, in an employment context, the decisionmaker must have known of an employee's protected activity before he can be found to have retaliated against the employee due to that activity. *See Mason* v. *Village of El Portal,* 240 F.3d 1337 (11th Cir. 2001); *Brungart* v. *BellSouth Telecommunications, Inc.,* 231 F.3d 791, 799-800 (11th Cir. 2000).

The plaintiff asserts in his memorandum in support of his motion for partial summary judgment that "[d]efendant retaliated against Plaintiff by actually firing Plaintiff shortly after finding out Plaintiff was to be a witness against Defendant regarding Ms. Crockett's Complaint" (Doc. 60-2, p. 23). That argument, however, contains no evidence showing that Hochuli was aware of the plaintiff's connection to Crockett's complaint. Rather, the County has presented evidence demonstrating that no reasonable juror could find that Hochuli had such knowledge.

On February 2, 2007, after the plaintiff had been given his pre-termination notice, Hochuli received a memorandum from Dale Garcia of the HR department that a discrimination complaint had been filed by an employee in his department (Doc. 59-4, p. 14). The memorandum provided no factual information about the complaint and did not even name Crockett, Thampi, or Hochuli (*id.*, pp. 14-15). The memorandum pointed out that investigations into discrimination are confidential, and department directors, as well as others, were told not to ask for evidence regarding the investigation (*id.*, p. 14). Moreover, Garcia testified to the procedures that are undertaken to keep the complaints confidential (Doc. 59-10). Hochuli stated that he never saw Crockett's complaint and that he knew about Thampi as a witness when the investigator's final report of June 5, 2007, came out (Doc. 59-7, p. 11).

Crockett's complaint was dated January 19, 2007 (Doc. 59-4, p. 7). The pre-termination notice was delivered on January 30, 2007, and Hochuli said he spent a couple of days preparing it (*id.*, p. 7). Thus, Hochuli had decided to fire the plaintiff before he received notice on February 2, 2007, that a discrimination complaint had been filed. And even then, the memorandum did not connect either Hochuli or the plaintiff to the complaint. In light of this evidence, no reasonable juror could conclude that Hochuli decided to terminate the plaintiff because he had been listed as a witness on Crockett's complaint.

Thampi speculates that, because the HR department and the County Administrator were aware of Crockett's complaint, "a strong inference can be drawn" that the information was leaked to Hochuli prior to the issuance of the pre-termination letter (Doc. 60-2, p. 24). There is no evidence of such a leak. Moreover, in light of the procedures that were designed to keep the complaint confidential, there is no basis for speculating that there was a leak.

The plaintiff also attempts to escape this deficiency by referring to the County, in general, as the terminating force, so that the knowledge of the County Administrator and the HR department about the complaint is imputed to it (*id.*, p. 25). However, the proper focus is on the actual decisionmaker, who in this case was Hochuli. *See Brungart* v. *BellSouth Telecommunications, Inc., supra,* 231 F.3d at 799-800. Thus, knowledge that the plaintiff was identified as a witness on Crockett's complaint cannot be ascribed to Hochuli simply because the County Administrator and certain people in the HR department were aware of it.

Similarly meritless is the plaintiff's assertion that Hochuli acted in "haste to get rid of Plaintiff as retaliation for testifying against Defendant" (Doc. 60-2, p. 25). Of course, by the time the plaintiff had given his statement on March 1, 2007, he had already been finally terminated. Furthermore, if Hochuli had been aware of the plaintiff being listed as a witness on Crockett's complaint, and was concerned about what the plaintiff would say, his most likely course would

have been not to fire the plaintiff since that would create animosity toward himself.

In sum, the evidence establishes that Hochuli did not know that the plaintiff had been listed as a witness on Crockett's complaint. The plaintiff has not adduced any evidence to the contrary. Accordingly, this is an additional basis for rejecting the plaintiff's First Amendment retaliation claim regarding termination.[4]

B. In September 2007, less than a month after filing this lawsuit, Thampi was offered a conditional position with Sarasota County by Jody Kirkman pending a background check. After gathering Thampi's employment records and speaking with Thampi's references, Kirkman rescinded the offer.

The plaintiff alleges that, "in further retaliation for Plaintiff having exercised his First Amendment rights for being a witness described, *supra,* officials of Defendant used derogatory, false, and/or distorted information designed to derail Plaintiff's job offer with Sarasota County" (Doc. 39, pp. 7-8). There is no probative evidence supporting this claim.

To begin with, there is no temporal proximity between the plaintiff's statement on March 1, 2007,

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[4] The County also makes a conclusory argument that Hochuli would have made the same decision even assuming a retaliatory animus (Doc. 59, pp. 18-19). Because the argument was not adequately developed, and the claim fails on several other grounds, evaluation of the argument is not warranted.

and Kirkman's contact with the County in September 2007. *See Drago* v. *Jenne,* 453 F.3d 1301, 1308 (11th Cir. 2006) (three-month proximity between protected activity and adverse action is insufficient to show causation). Furthermore, Hochuli, the alleged retaliator, had no contact with Sarasota County since he was in Iraq. Also, Crockett's complaint was resolved with a finding of no race discrimination (Doc. 59-4, p. 50). Under these circumstances, there is no basis for an inference of a retaliatory animus.

In addition, Kirkman talked about the plaintiff with two individuals at Manatee County, John Zimmerman and Don Gray. During their depositions, no testimony was adduced indicating that they knew about Crockett's grievance or the plaintiff's involvement with it (*see* Doc. 59-9, p. 7; Doc. 59-11, p. 10). Further, there was no such evidence from any other source. Accordingly, the evidence does not support a finding that Gray and Zimmerman responded to Kirkman's inquiries with a retaliatory animus.

For these reasons, a rational jury would not find that the County retaliated against the plaintiff because he was a witness in connection with Crockett's complaint.

In the plaintiff's response to the County's summary judgment motion, the plaintiff comments near the end that the County provided disparaging information about the plaintiff in retaliation for filing this lawsuit (Doc. 64, pp. 19, 20).

The plaintiff, however, did not allege in the third amended complaint that the County retaliated against him for filing the lawsuit (Doc. 39). The plaintiff only alleged that the County retaliated against him for being a witness. Consequently, the plaintiff has not properly alleged a retaliation claim based upon the filing of the lawsuit. *See Financial Security Assurance, Inc.* v. *Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007). At the hearing, the plaintiff sought to overcome this deficiency on the ground that the motion for leave to file the third amended complaint indicated that the amended complaint would allege a retaliation claim based on the filing of this lawsuit. Even if this were true, it would not suffice to remedy the deficiency; it is what is alleged in the complaint that counts, and not what the motion for leave to amend proposed. In fact, however, the plaintiff's assertion regarding the content of the motion for leave to amend is not true. There is nothing in that motion that requests leave to amend to add a retaliation claim based upon the filing of the lawsuit (Doc. 35).

Furthermore, the plaintiff did not develop any argument supporting a claim of First Amendment retaliation due to the filing of the lawsuit. Thus, the plaintiff made no attempt to set forth facts showing he satisfied the elements of such a claim. Consequently, even if the plaintiff had alleged a retaliation claim based upon the filing of this lawsuit, it would be deemed abandoned due to lack of development.

In all events, the evidence does not support a claim of First Amendment retaliation predicated on this lawsuit. Thus, Zimmerman and Gray testified that, at the time they spoke with Kirkman about Thampi's employment history, they did not know about Thampi's lawsuit (Doc. 59-9, p. 7; Doc. 59-11, p. 10). The plaintiff provides no evidence to the contrary. Accordingly, Zimmerman and Gray would not have a basis for engaging in retaliation because they did not know of the lawsuit.

The plaintiff also relies upon a September 2007 Google search highlighting Thampi's civil rights suits. The printout was found in the file Kirkman had concerning Thampi. However, the file contained information from Sarasota County, as well as the public employment records requested from Collier County and Manatee County (Doc. 59-15, p. 13).

The plaintiff speculates that someone from Manatee County conducted the Google search and gave it to Kirkman to retaliate against the plaintiff for filing the lawsuit (Doc. 64, p. 21). The plaintiff has no significant probative evidence to support the speculation. Moreover, Kirkman believed that the search was performed by someone from the HR department of Sarasota County, although he was not sure (Doc. 59-15, pp. 10, 11). He did say further that the Google search document was found among the materials from Sarasota County (*id.*, p. 11).

The plaintiff contends that Kirkman testified that the Google search was the "first page" of

Thampi's employment file that Manatee County gave to him (Doc. 60-2, p. 12). However, in my reading of his testimony, Kirkman was referring to the first page of the exhibit plaintiff's counsel was showing him at the deposition, not the location of the Google search in his records (Doc. 59-15, p. 10). In any event, even if Kirkman's testimony is read to say that the Google search was the first page of the materials, that would not establish that the search came from some anonymous person at Manatee County, since Kirkman said that the search document was among the papers from Sarasota County. In sum, the Google search was most likely conducted by the Sarasota HR department, as Kirkman believed; it is only conjecture to think that it was conducted by the Manatee County HR department.

The Google search does not support the plaintiff's retaliation claims not only because the plaintiff has no probative evidence that the search was conducted by someone with Manatee County, but also because there is no causal connection between the search and Kirkman's withdrawal of the plaintiff's conditional job offer.

Kirkman testified that he rescinded the offer of employment due to the poor performance evaluations, including "problems that actually occurred in the day-to-day activities or how he managed staff" (*id.*, p. 5). Kirkman explained (*id.*, p. 4):

> This position requires limited supervision. It's actually in a satellite location from where

> I am located. That being said, I needed an individual that could perform. I was really concerned after I started getting into both reference checks and just looking at the information we got from Collier and Manatee. I felt this incumbent may have not performed in the manner we needed in that position. And again, it was performance based at that point.

Kirkman also stated (*id.*):

> Basically he met the position technically. We had moved forward to the point of starting to check references. Once we got into the reference checks and a little more research, it basically pulled us back from offering the position.

Notably, Kirkman testified that he first became aware of the lawsuit approximately six weeks before he was deposed (*id.*, p. 6). Consequently, it could not possibly have factored into Kirkman's decision not to hire Thampi. That statement is consistent with Kirkman's testimony that Gray and Zimmerman did not tell him about the lawsuit (*id.*, p. 13). There is thus no evidence that raises a genuine issue of fact about whether Kirkman had knowledge of the lawsuit. *See Daniels* v. *Hale,* 2009 WL 3418586 at *5 (11th Cir. 2009) (unpub. dec.).

The plaintiff attempts to discredit Kirkman's testimony about the reasons he rescinded the offer on the ground that Zimmerman and Gray testified at depositions that they did not give Kirkman a

negative report of Thampi's performance (Doc. 64, p. 19). Kirkman did not articulate in his deposition any specific negative performance comments from Zimmerman and Gray, but did recall that both said they did not supervise the plaintiff (Doc. 59-14, p. 5).

The negative report on the plaintiff's job performance would have come not from Zimmerman and Gray, but from the plaintiff's personnel file that was requested by Sarasota County under Florida's public records act. That file contained a number of adverse assessments, including the detailed pre-termination notice (*see* Doc. 59-3, pp. 23-25). Kirkman testified further that he received records from Collier County that had negative information about the plaintiff's performance, and that he also took that information into consideration in deciding whether to complete the hiring process for the plaintiff (Doc. 59-15, p. 14).

In sum, the plaintiff's claim that the County retaliated against him by sabotaging his Sarasota job as result of his filing of this lawsuit fails for a number of reasons. Thus, such a claim was not pled; it was not developed in the plaintiff's memoranda; the plaintiff has failed to show a causal connection between the withdrawal of the job offer and the filing of the lawsuit; and Kirkman explained that he withdrew the job offer based upon the information in the plaintiff's personnel files from Manatee and Collier Counties.[5]

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[5] Thampi also claimed that he lost jobs in several other counties on account of poor references from Manatee County in

(Continued on following page)

For the foregoing reasons, the theories upon which the plaintiff predicates his First Amendment retaliation claim are not viable. Accordingly, count II will be dismissed.[6]

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retaliation for his alleged protected activities. Thampi contends that he received verbal offers from Pompano Beach, DeSoto County, and Palm Beach Department of Health, that were "quickly withdrawn after a background/reference check with Defendant Manatee County" (Doc. 60-2, p. 4). The third amended complaint only alleges the job loss with Sarasota County, and does not allege the withdrawal of offers by any other counties (Doc. 39). Consequently, no claim has been raised with respect to job withdrawals by any counties other than Sarasota. Furthermore, unlike the Sarasota County claim, no facts were developed regarding job withdrawals by other counties. Therefore, even if the claim had been properly raised, it would be deemed abandoned.

[6] The plaintiff continues to complain of the termination proceedings, and asserts that those proceedings amounted to retaliation by the County (Doc. 60-2). Those proceedings have previously been considered and found to have satisfied due process (Doc. 40). Consequently, the plaintiff's continued complaints about the proceedings add nothing to his retaliation claims.

The plaintiff also complains in his memorandum about workplace harassment (Doc. 60-2, pp. 18-23). There is no allegation in the third amended complaint which even remotely suggests such a claim. Accordingly, the plaintiff's assertion of harassment is irrelevant.

The plaintiff asserts further that he was not afforded the "luxuries" others in a pre-termination status were afforded (Doc. 61-2, pp. 23-28). To the extent that he is complaining that he did not receive pay for the days spent in that status, the claim fails because, again, it was not alleged in the third amended complaint. Further, it was not meaningfully developed in the memorandum. For example, the plaintiff fails to identify

(Continued on following page)

IV.

The plaintiff claims next that the "[d]efendant's actions/behavior violated Title VII of the Civil Right Act of 1964 when it retaliated against plaintiff" (Doc. 60-2, p. 32). Under Title VII, it is unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a).

The plaintiff has not presented any direct evidence of retaliation. Rather, he is apparently proceeding with his claim using the framework outlined in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). To establish a *prima facie* case of retaliation under that approach, the plaintiff must show that: (1) he engaged in protected opposition to Title VII discrimination or participated in an activity protected by Title VII; (2) he suffered an adverse action; and (3) there is a causal connection between the protected

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the decisionmaker regarding lack of pay. Of course, if it was Hochuli, it has already been shown that, due to lack of knowledge of the Crockett complaint, he did not act with a retaliatory animus. In addition, the purported comparator's situation is not nearly identical to the plaintiff's (*see* Doc. 60-2, p. 27). Thus, the purported comparator received three days pay for the period between his pre-termination notice and the pre-termination meeting (*id.*). The plaintiff received the pre-termination notice, and the pre-termination meeting was held at that time.

activity and the adverse action. *Crawford* v. *Carroll*, 529 F.3d 961, 970 (11th Cir. 2008).

A. The plaintiff claims that the County retaliated against him when he was listed as a witness and when he testified (Doc. 60-2, p. 35). The plaintiff asserts a number of adverse actions as a result (*id.*, p. 34). However, the only actions that are arguably viable (*see* fn. 6), are the termination and the withdrawal of a job offer by Sarasota County.

The plaintiff claims that he was retaliated against for participating as a witness "pursuant to an investigation . . . intended in part to ensure that the rights of a fellow employee . . . were protected against discrimination . . . under Title VII" (Doc. 60-2, p. 32). As the defendant correctly points out, the participation clause is unavailable to Thampi in this situation (Doc. 59, p. 20).

In the Eleventh Circuit, an act of "participation" requires the existence of a Title VII proceeding or investigation. *EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *Clover* v. *Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999); *Van Portfliet* v. *H & R Block Mortg. Corp.*, 290 Fed. Appx. 301, 303 n. 2 (11th Cir. 2008). Thus, the participation clause protects proceedings that occur in conjunction with, or after the filing of, a formal charge with the EEOC. *EEOC* v. *Total Sys. Servs., Inc., supra*, 221 F.3d at 1174. The County's investigation into Crockett's claim began pursuant to internal policy and was not conducted as part of an investigation of

an EEOC claim. Accordingly, the plaintiff's participation in an internal investigation prior to a formal complaint with the EEOC does not fall within the scope of the participation clause. Furthermore, at the time the pre-termination notice was given to the plaintiff, he had not even participated in an in-house investigation.[7]

A claim brought under the opposition clause, on the other hand, does not require the initiation of a Title VII proceeding or investigation. *Rollins* v. *State of Fla. Dep't. of Law Enforcement,* 868 F.2d 397, 400 (11th Cir. 1989) (per curiam). The Supreme Court held in *Crawford* v. *Metropolitan Govt. of Nashville and Davidson Cty.,* ___ U.S. ___, 129 S.Ct. 846, 852-53 (2009), that an employee may engage in a protected activity under the "opposition" clause of Title VII even if the employee does not initiate a complaint of discrimination, but instead indicates opposition to an act of discrimination in the process of responding to questions from the employer during an investigation initiated by a co-worker.

The plaintiff contends that simply being listed as a witness in a co-worker's internal discrimination complaint is "opposition" (Doc. 60-2, p. 35; Doc. 64,

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[7] The issuance of the pre-termination letter is the point at which Hochuli decided to fire the plaintiff. Thus, the plaintiff must show that, at that point, Hochuli had a retaliatory animus. In any event, the plaintiff had not even participated in an in-house investigation by the time of the final notice of termination.

p. 7). However, "[e]ven under *Crawford,* the plaintiff must communicate *something* to the employer that indicates an opposition to some employment action that could be construed as discriminatory." *Fields* v. *Locke Lord Bissell & Liddell LLP,* 2009 WL 2341981 (N.D. Ga. 2009) (emphasis in original). As indicated, the plaintiff had not said anything to the County about Crockett's complaint at the time the pre-termination notice was issued, or even by the time of the final termination notice. Consequently, the plaintiff's listing as a witness does not fall within the scope of the opposition clause.

The plaintiff therefore has failed to show that his being listed as a witness on Crockett's complaint is protected activity under Title VII. This defeats a retaliation claim under Title VII based upon Crockett's complaint.

In addition, the plaintiff has not shown a causal connection between the termination and being listed as a witness. As explained in connection with the First Amendment retaliation claim, there is no evidence that the decisionmaker, Hochuli, was aware of Crockett's complaint, or the plaintiff's connection with it, by the time of the plaintiff's termination. Because the plaintiff did not establish a causal relationship between his involvement with Crockett's complaint and his termination, he has failed to establish a *prima facie* case of retaliation based upon that involvement.

Furthermore, even if the plaintiff did present a *prima facie* case of Title VII retaliation with respect to his termination, the claim would still fail under the *McDonnell Douglas* test. *See Chapman* v. *AI Transportation,* 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*). Thus, the County has articulated a legitimate non-retaliatory reason for the termination: The plaintiff's work performance was unsatisfactory to Hochuli. The plaintiff, in response, has not demonstrated that this reason is pretextual.

As the County correctly points out, the plaintiff was required to meet the County's articulated reason head on and rebut it. *Id.* at 1030. The County has presented the plaintiff's personnel file which reflects a number of job deficiencies recorded by Hochuli, as well as some misuse of a computer (Doc. 59-3). Notably, this is not a case like many others where the employee had been receiving good to excellent job reviews and then, all of a sudden after some purported protected activity, a very bad review is set forth. Here, Hochuli recorded less than favorable reviews throughout the plaintiff's tenure with the County. Moreover, the pre-termination notice stated in detail the reasons for Hochuli's dissatisfaction with the plaintiff's performance. The plaintiff has not adduced any evidence that would support a finding that Hochuli did not honestly believe that the plaintiff's job performance was unsatisfactory. *See Holifield* v. *Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997).

It is insufficient for the plaintiff to argue that he was successful in obtaining unemployment benefits

(Doc. 64, p. 15). The issue as to those benefits, according to the plaintiff (*id.*), was whether he was discharged for misconduct. Hochuli discharged the plaintiff due to poor job performance. with misconduct (computer misuse) playing, at most, a small part.

Similarly, the plaintiff cannot demonstrate that Hochuli' s reasons for discharging the plaintiff were pretextual by stating favorable comments from coworkers, such as Crockett (*id.*, pp. 16-17). Those individuals did not supervise the plaintiff and thus were in no position to assess the plaintiff's work from Hochuli's perspective.

The plaintiff's comment that he went five months prior to the pre-termination notice without being written-up or scolded (*id.*, p. 13) does not provide any support for a finding that Hochuli did not honestly believe the plaintiff's job performance was unsatisfactory. Indeed, the fact that the plaintiff thinks going five months without being written-up is something special reflects that he really does not understand what constitutes a good job performance.

Therefore, the arguments asserted by the plaintiff do not provide any basis for finding that the County's reason for the termination was pretextual. Consequently, that reason provides an additional ground for concluding that the plaintiff's claim of

Title VII retaliation concerning the termination lacks merit.[8]

B. With respect to the Title VII retaliation claim, the plaintiff hardly asserts any argument based upon the filing of this lawsuit. In his memorandum in support of his motion for partial summary judgment, the plaintiff limits his argument regarding Title VII retaliation to being a witness with respect to Crockett's complaint (Doc. 60-2, pp. 32-35). The only reference to the lawsuit in his memorandum concerning the Title VII claim relates to a contention regarding interference with mitigation of damages (*id.*, pp. 38-40). The plaintiff briefly refers to the lawsuit in his opposition to the County's motion (Doc. 64, pp. 19-21). The plaintiff, however, has failed to provide any meaningful argument explaining why the County's challenge to a Title VII retaliation claim based upon the filing of this lawsuit should be rejected. That failure justifies the conclusion that the plaintiff has abandoned such a claim of Title VII retaliation.

In all events, the claim should be dismissed essentially for the reasons why the similar First

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[8] In his memorandum, the plaintiff asserts, in a conclusory manner, other alleged adverse actions of workplace harassment, denial of luxuries in the pre-termination process, and unconscionable delays in the post-termination hearing process (Doc. 60-2, p. 34). For the same reasons that these contentions are not viable with respect to the First Amendment retaliation claim, they are not viable with respect to the Title VII retaliation claim either (*see* fn. 6, *supra*).

Amendment retaliation claim was dismissed. As previously explained, the plaintiff did not even allege in the third amended complaint a retaliation claim based upon this lawsuit. Furthermore, any such claim is properly deemed abandoned in view of the plaintiff's failure to develop any argument regarding the claim, as just discussed.[9]

In addition, as discussed above, the retaliation claim based upon the lawsuit fails on the merits. Thus, Zimmerman and Gray were not aware of the lawsuit when they talked with Kirkman, and Kirkman was not aware of the lawsuit when he withdrew the job offer. Consequently, there was not a causal connection between the filing of the lawsuit and the withdrawal of the job offer.

Moreover, Kirkman stated that he withdrew the job offer based upon information he obtained from the plaintiff's personnel files at Manatee and Collier Counties that showed unsatisfactory job performances. This evidence was not refuted, and it also negates a conclusion that the job was withdrawn due to the filing of the lawsuit.

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[9] It is appropriate to note at this point that the plaintiff does not even explain whether he views the Google search as an adverse action, or merely as evidence indicating that Kirkman was aware of the lawsuit when he withdrew the job offer. If it is the former, the plaintiff needed to show why the providing of accurate, public information constitutes adverse action under *Burlington Northern & Santa Fe Ry. Co.* v. *White,* 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006), a conclusion that is not obvious to me.

For the foregoing reasons, the plaintiff's Title VII retaliation claim fails. Accordingly, count III will be dismissed.

It is, therefore, upon consideration

ORDERED:

1. That the defendant's Motion for Summary Judgment (Doc. 59) is hereby **GRANTED**, and counts II and III of the plaintiff's third amended complaint are hereby **DISMISSED**.

2. That the plaintiff's Motion for Partial Summary Judgment (Doc. 60) be, and the same is hereby **DENIED**.

3. That the Clerk shall enter judgment **DISMISSING** this case and, thereupon, **CLOSE** the case.

DONE and ORDERED at Tampa, Florida, this 9th day of November, 2009.

/s/ Thomas G. Wilson
THOMAS G. WILSON
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cv-1445-T-TGW

October 22, 2008
Tampa, Florida

MOHAN THAMPI,

Plaintiff,

vs.

MANATEE COUNTY
BOARD OF COMMISSIONERS,

Defendant.
_____/

TRANSCRIPT OF DIGITALLY-RECORDED
CASE MANAGEMENT CONFERENCE and
HEARING ON MOTION TO COMPEL
BEFORE THE HONORABLE THOMAS G. WILSON,
UNITED STATES MAGISTRATE JUDGE

Appearances of Counsel:

For the Plaintiff:

Mr. Samuel C. Gold

For the Defendant:

Mr. Robert M. Eschenfelder

Transcribed by: Dennis Miracle, Official Reporter

* * *

[12] the discovery motion, because what I did is I said, hey, the discovery cutoff motion – motion cutoff date is the discovery motion cutoff date. That's it.

All right. And I think you probably have done enough amending, but any third-party claims. joinder of parties, any – do we need dates for that? Is there any likelihood of that?

MR. GOLD: Your Honor, the amendments in this case have, I think with the exception of one, have largely done – have been supplemental amendments based on new developments. One was an amendment because we were waiting for the Title VII disposition –

THE COURT: Right.

MR. GOLD: – at the EEOC. So normally – and this brings me to something that I think dovetails with this – normally you'd have an amendment deadline out there so you would have an opportunity to amend should you come across something in discovery which gives you cause to amend. So normally the amendment deadlines at least allow for a little time for discovery to happen.

Now, in this case – and I don't want to argue the motion that I filed yesterday – but in this case we've had discovery propounded to the defendant since July, since shortly after this Court lifted its stay without any pre condition, and we've got nothing since then. Defense apparently claims that [13] this particular meeting or discovery order, through

conversations with your chambers, was a condition precedent to –

THE COURT: Nobody talked with me.

MR. GOLD: Pardon me?

THE COURT: Nobody talked with me.

MR. GOLD: That is correct. That is correct.

THE COURT: Okay.

MR. GOLD: He represented a conversation with a law clerk who indicated that discovery was not supposed to happen. Now, that was a big red flag to me. My goodness, what was I supposed to do? An employee of the Court, as he's represented – I don't know what the law clerk said because I wasn't part of the meeting.

THE COURT: It doesn't matter. It's a law clerk. If someone wants an order from me, they have to file a motion, and I rule on it in writing. It's the only thing that counts.

People are permitted to call my office to get things organized. Some judges don't even allow that. I do because it tends to organize things. But any comment by a law clerk doesn't mean anything; it doesn't count. I don't talk to people on the phone, so there's no problem there. So the only thing that counts is if someone files a motion and I enter an order. That's the bottom line.

MR. GOLD: I appreciate knowing that.

[14] THE COURT: Okay.

MR. GOLD: My point is, in that case there has been no order; there's been no motion for extension of time, nothing. So I'm asking for another 90 days to amend because I believe I should have gotten discovery a couple of months ago.

THE COURT: Okay. Well, I mean, I –

MR. GOLD: That's all – that's what I'm saying.

THE COURT: I don't care.

MR. GOLD: I've been put at a disadvantage.

THE COURT: I mean, I don't really care.

MR. ESCHENFELDER: May I, Your Honor?

THE COURT: Yeah.

MR. ESCHENFELDER: Well, first of all, he indicated he didn't want to argue his motion and he's arguing his motion.

THE COURT: Well, I think we can get rid of the motion, frankly –

MR. ESCHENFELDER: Well, I do, too, Your Honor.

THE COURT: – rather than having everybody come back here.

I didn't read it. I'm aware of it. But we're here talking about discovery and the progression of it. It seems to me you can just go forward and I'll deny that as moot.

MR. ESCHENFELDER: And certainly, Your Honor, there's been – the representation that I made to my opposing counsel is simply that in talking with the law clerk, it was discussed

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 09-16139-FF

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MOHAN THAMPI,

Plaintiff-Appellant,

versus

MANATEE COUNTY
BOARD OF COMMISSIONERS,
as the body corporate governing
Manatee County,

Defendant-Appellee.

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On Appeal from the United States District Court
for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Sept. 10, 2010)

Before: BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES
CIRCUIT JUDGE

"EXHIBIT B"

(Filed Oct. 21, 2008)

**YAHOO! MAIL**
Classic

**Re: New case management and scheduling order/Thampi v. Manatee/Hochuli depo**
Monday, August 18, 2008 5:34 PM

From: "Atty. Samuel C. Gold" <samgold1@aol.com>
To: robert.eschenfelder@mymanatee.org
Cc: mikev.goldattorneys@yahoo.com

Rob,

What do you mean by discovery order? There is a case management and scheduling order to be entered. What rule or order of this court do you cite supporting your apparent assertion that discovery cannot take place? Who told you discovery was not allowed? No one told me that. Ex parte communications are permissible only for routine checks into scheduling matters, not for discussions as to whether or not discovery can proceed.

Very Truly Yours,

Atty. Samuel C. Gold

Gold Law Firm
4825 Pike Bay Road, No. 11
Eagle River, WI 54521
Tel: 715-617-1180

Gold Law Firm, P.A.
P.O. Box 770824
Naples, FL 34107-0824
Tel: 239-248-8700

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– Original Message –
From: robert.eschenfelder@mymanatee.org
To: Sam Gold <samgold1@aol.com>
Sent: Mon, 18 Aug 2008 3:40 pm
Subject: Re: New case management and scheduling order/Thampi v. Manatee/Hochuli depo
< br>

Mr. Gold,

There is no ex parte communication inasmuch as I did not speak to the judge concerning this matter. I did speak to the judge's law clerk, which is not an ex parte communication, and which is a common occurrance [sic] for litigators. Indeed, if you would direct your attention to the judge's web page, you would find that he specifies that he encourages litigators to contact ***his office*** to inquire concerning such matters. Given what the judge's clerk indicated,

we will await the Court's discovery order, which should provide more than sufficient time to conduct all depositions including that of Mr. Hochuli.

Rob

**Sam Gold**
**<samgold1@aol.com>**
08/18/2008 01:07 PM

To "robert.eschenfelder@my manatee.org" <robert.eschenfelder@my manatee.org>
cc "mikev.goldattorneys@yahoo.com" <mikev.goldattorneys@yahoo.com>
Subject Re: New case management and scheduling order/ Thampi v. Manatee/ Hochuli depo

Rob,

I am troubled by the ex parte communication here. The stay has been lifted and we had our Rule 26 conference. Those were the only bars to discovery. No stay on discovery has been entered.

Please provide dates for Mr. Hochuli's deposition by the end of the week or we will subpoena. Thank you.

Very Truly Yours,

Atty. Samuel C. Gold

Gold Law Firm
4825 Pike Bay Road, No. 11
Eagle River, WI 54521
Tel: 715-617-1180

Gold Law Firm, P.A.
P.O. Box 770824
Naples, FL 34107-0824
Tel: 239-564-9501 or
239-248-8700

Sent from my iPhone

On Aug 18, 2008, at 11:32 AM, robert.eschenfelder@mymanatee.org wrote:

Mr. Gold,

I spoke today to the Court's law clerk on all the open matters and she has indicated that the Court will be issuing its order disposing of the due process motion w/i about 10 days, and that at that time the Court will be setting a hearing on the discovery plan and pending disputed matters listed therein. She indicated the Court will address all those issues and then issue its discovery order, after which discovery efforts could begin.

Let me know if you have any other questions. We will be closed down, at least for tomorrow, due to the hurricane issue.

thanks,
Rob

**"Atty. Samuel C. Gold" <samgold1@aol.com>**
08/12/2008 07:01 AM

To robert.eschenfelder@mymanatee.org
cc mikev.goldattorneys@yahoo.com
Subject Fwd: New case management and scheduling order/Thampi v. Manatee/Hochuli depo

Dear Rob:

Have you been able to come up with proposed dates for Tim Hochuli's deposition? Thanks again.

Very Truly Yours,

Atty. Samuel C. Gold

Gold Law Firm
4825 Pike Bay Road, No. 11
Eagle River, WI 54521
Tel: 715-617-1180

Gold Law Firm, P.A.
P.O. Box 770824
Naples, FL 34107-0824
Tel: 239-248-8700

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IF YOU HAVE RECEIVED THIS IN ERROR, PLEASE IMMEDIATELY NOTIFY THE SENDER BY AN APPROPRIATE EMAIL REPLY OR BY CALLING US AT THE NUMBERS ABOVE AND DELETE THE ENTIRE MESSAGE. THANK YOU.

– Original Message –
From: samgold1@aol.com
To: robert.eschenfelder@mymanatee.org
Sent: Thu, 7 Aug 2008 10:47 am
Subject: New case management and scheduling order/ Thampi v. Manatee/Hochuli depo

Dear Rob:

As you know we do not have a case management and scheduling order in this case. I would suggest we jointly develop a new one as as [sic] soon as possible. I'll take the liberty of sending you a draft.

As you know, we would like to depose Tim Hochuli. We would propose doing this in early September. I anticipate the deposition taking a full day. Please send me dates with availability at your earliest possible convenience. I see no bar at this time with proceeding with with [sic] this deposition or any other deposition, including that of my client.

Than ks [sic] in advance for your attention to the above.

Very Truly Yours,

Samuel C. Gold, Esq.

Exhibit 9

(Filed Jun. 22, 2009)

**From:** "Dave Branning" <DaveBranning@WilsonMiller.com>
**To:** <mvthampi@juno.com>
**Date:** Fri, 16 Feb 2007 09:32:18 -0500
**Subject:** FW: bcc: re: M.W. Utility Agreement

– Original Message –
**From:** Bob Halbach
**Sent:** Thursday, February 01, 2007 7:25 AM
**To:** Dave Branning; Nicholas Blair
**Subject:** FW: bcc: re: M.W. Utility Agreement

FYI.....

**Robert J. Halbach, P.E.**
Senior Project Manager/Senior Associate
Phone(941) 907-6900 x 303
Fax (941) 907-6910
***WilsonMiller.com***

– Original Message –
**From:** Stacy Dillard-Spahn [mailto:sdillard-spahn@icardmerrill.com]
**Sent:** Thursday, February 01, 2007 12:13 AM
**To:** Bob Halbach
**Subject:** fw: bcc: re: M.W. Utility Agreement

Bob:

FYI re: Mohan, if you didn't already know.

Stacy

– Original Message –
Date: Thu, 01 Feb 2007 00:03:59 -0500
From: SDILLARD-SPAHN (Stacy Dillard-Spahn)
To: Sarah.Schenk@co.manatee.fl.us

cc: greg.Meath@us.taylorwoodrow.com, WMERRILL
Subject: bcc: re: M.W. Utility Agreement

Sarah:

Thanks for the update regarding Mohan and I look forward to reviewing the list of issues. What can we do to bring Dan up to speed immediately so that we can have a more productive meeting on the 15th? The participating developers need the agreement finalized as soon as possible and everyone is growing increasingly frustrated with the repeated delays.

It was my impression from our last meeting that we were fairly close to finalization and were just working out a few details. I know that none of us wants this to take a step backwards. Please let me know what you need for us and our clients to do to finalize this agreement as soon as possible.

Thanks,
Stacy Dillard-Spahn, Esq.
Icard, Merrill, Cullis, Timm,
Furen & Ginsburg, P.A.
2033 Main Street, Suite 600
Sarasota, FL 34237
Tel: 941-366-8100, ext. 378
Fax: 941-366-6384
sdillard-spahn@icardmerrill.com

On Wednesday, January 31, 2007 5:32 PM, Sarah.Schenk@co.manatee.fl.us wrote:

**Date:** Wed, 31 Jan 2007 17:32:22 -0500

Stacy, next week I will draft a list of issues for your consideration prior to our meeting on Thursday, Feb. 15.

P.S. Mohan is not [sic] longer with the County. One purpose of our meeting is to bring Dan Schlandt, Dep. County Admin. up to speed on the proposal.

Sarah A. Schenk
Assistant County Attorney
Manatee County Attorney's Office

**Stacy Dillard-Spahn <sdillard-spahn@icardmerrill.com>** To
cc
Subject

01/29/2007 05:38 PM

Confidentiality Notice: This e-mail is for the sole use of the recipient(s), Any unauthorized review, use, disclosure or distribution is prohibited.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MOHAN THAMPI,

Plaintiff,

vs.

MANATEE COUNTY BOARD OF COMMISSIONERS, as the body corporate governing Manatee County,

Defendants.
_____/

CIVIL ACTION

CASE NO. 8:07-CV-01445-T-30TGW

## AFFIDAVIT OF MOHAN THAMPI

(Filed June 22, 2009)

Before me personally appeared MOHAN THAMPI, who after being duly sworn deposes and says that the following facts are true and correct and given on personal knowledge:

1) I voluntarily came forward as a witness on behalf of Ms. Deloris Crockett, and I participated in on my own accord during Defendant Manatee County's investigation into Ms. Crockett's discrimination complaint.

2) My testimony as a witness for Ms. Crockett was entirely voluntary and not in the ordinary course of my duties as an employee of Defendant Manatee County.

3) My statements as a witness for Deloris Crockett were made before investigatory officials of Defendant Manatee County, and provided information concerning the unequal treatment of non-white workers (specifically Deloris Crockett) by Tim Hochuli, then head of Manatee County's Project Management Division, regarding said treatment which was in violation of Manatee County's Human Resources Policies. As a former manager with Defendant Manatee County, I am familiar with said policy.

4) My testimony on behalf of Ms. Crockett before investigatory officials of Defendant Manatee County was made in a private setting and outside of my regular workplace duties; in fact, I had already been terminated by Defendant Manatee County when I testified for Ms. Crockett on March 1, 2007.

5) Dan Gray (Director), John Zimmerman, (Water Manager), and Dave Shulmister (Wastewater Manager) of the Utility Operations Department agreed to be witnesses at my post-termination hearing. Both Rob Shankle and Peter Bonk, who were later hired as managers by Dan Gray, informed me how disgusted and appalled the Utilities Department heads were over my firing and stated they had personally conveyed to Defendant Manatee County of what a high regard they had for me. Rob Shankle told me to talk to Dan Gary to see about creating a position for me ad [sic] Dan was doing the same for Rob Shankle.

6) Mr. Jody Kirkman of Sarasota County actually offered me an employment position without any conditions in April 2007, after requesting and receiving my list of references in April 2007. I was under the understanding he had checked my references before offering me the job. The references included Dan Gray and John Zimmerman of Manatee County. He was fully aware of my termination situation and forthcoming hearing, and told me not to worry as he had previously worked with Tim Hochuli and Tod Phinney, and had a very poor opinion of their work ethics. However, Jody Kirkman later called me in mid-April 2007 and said there was a temporary hiring freeze in Sarasota County and he would get the hiring paperwork going as soon as it was lifted. He asked me to update him on my employment status. Four months later, Jody called me and asked if I was available so he could start the hiring processing. I said I had now been officially terminated and asked him if he had issues. He replied that he had no issues, and Mr. Kirkman said he would have Ms. Dorene Starkey start up the paperwork process. Dorene then called me and I received the offer letter, which I signed and sent back. I then completed the medical and reference checks and received my start date of September 17, 2007.

7) I did not receive any pay for my attendance at the pre-termination hearing/meeting, being that I was never offered a pre-termination hearing/meeting, despite being told by Ms. Vera Dragisic of the County Administrator's Office when handing in my written

response on February 2, 2007, that Mr. Hunzeker would be giving me a pre-termination hearing.

8) I am of South Asian ethnicity and received no prior notice of my pre-termination meeting.

9) I was never afforded an opportunity to resign prior to being terminated.

10) I never received notification of COBRA benefits within the federally mandated deadlines.

11) I have never seen, nor has the County ever produced, the fictitious Christmas Day Memo dated December 25, 2006, written by Tim Hochuli. Within said fictitious memo, Mr. Hochuli alleges that I did not comply with his instructions. Again, this memo does not exist, and all the charges claimed to be contained within the memo are false. I questioned the existence of said memo, first requesting the memo in my February 2, 2007 response, and said memo was never provided; therefore, any production of said fictitious document at this point would be a fabrication.

12) Mr. Tod Phinney, on paper, worked under me as the Project Engineer Supervisor. I quickly found out he was lacking ability, harassed staff, and was bad for employee morale, and when I tried to discipline him or curb his excessive overtime, Tim Hochuli threatened me with the loss of my job and also started writing me up. Behind my back, Tod Phinney received many favors from Tim, and Tim and Tod were conspiring so that Tod could run a private

consulting side-business where it became clear he was using County supplied resources.

13) The State of Florida ruled in my favor in my unemployment claim on March 8, 2007, after determining that Defendant Manatee County had provided no evidence of misconduct. The State Unemployment Agency determined it was a "personality conflict" which was basically another way of saying discrimination.

14) I contacted Mr. Robert Halbach of Wilson Miller, Inc. about potential job openings just after receiving my February 12, 2007 termination letter from Tim Hochuli. To my surprise and shock, he, along with Mr. Dave Branning, informed me that they knew I had been terminated 2 weeks ago. I told them that was not true as I had only been officially terminated on February 12, 2007, and that they are the first people outside the County who I was telling. They told me that Ms. Sarah Schenck, Assistant County Attorney, had sent out an email on January 31, 2007, basically stating that I had been terminated and that Dan Schlandt, Assistant County Administrator, would replace me in the Moccasin Wallow Consortium utility agreement negotiations. The staff at Wilson Miller expressed shock at my dismissal as they said my hiring over 2-½ years ago was the biggest improvement the County had ever made in the Project Management Department. They also said groups of consultant and contractors had been complaining extensively about how difficult it was to work with Tim Hochuli and were planning again to

talk to the new County Administrator, Ed Hunzeker, about removing Tim Hochuli.

15) I first met Mr. Pat Neal and his assistant Mr. Dale Weidemuller, representing Neal Communities, Inc. around January of 2006, regarding utilities for some developments he had east of the County. I told him he had to cost share or participate with some other new developments to put in new utilities. Pat Neal was not inclined to contribute his fair share of the costs other than to have the County allow him to hook into the existing utilities, which were already committed at maximum capacity. I found Pat Neal's attitude belligerent. When I informed Tim Hochuli later about what was said at the meeting, Tim laughed and said Pat Neal ended up getting what he wanted and had high influence with the 9th floor, implying that Pat Neal was "in bed" with the County Attorney, County Administrator, and Commissioners. Hochuli also repeated at least a couple of times that the County Attorney's office always wrote agreements which benefited Pat Neal and not the County taxpayer, and there was nothing anyone could do about it. Basically, this was my first warning that my job could be in jeopardy if I didn't do things the way Pat Neal wanted them done.

16) In subsequent months since the January 2006 meeting with Pat Neal, I worked with his assistant, Dale Weidemuller, and their consultant, Wilson Miller, Inc., in coming up with a draft of the Rivers Reach/Cross Creek Utility Developer Agreement. Around June of 2006, Dale Weidemuller thanked me

and my staff profusely, both verbally and in written form. Wilson Miller staff informed the developers cost share in the agreement was around $2 million. The draft agreement went to the County Attorney's office and to my surprise nothing more was heard about finalizing the agreement. I did not see Dale again until his appearance as a surprise witness at my post-termination hearing in May of 2007.

17) To my surprise, at the May 2007 post-termination hearing, Dale Weidemuller was the first County witness produced; there, he made blatantly false accusations, then contradicting himself by saying he really liked me. After the hearing, upon speaking to Mr. Robert Halbach, Senior Project Manager of Wilson Miller, he told me how Pat Neal had sat in a meeting with Sue Sandhoff and given a check for $40,000 instead of the $2 million as per the original Rivers Reach/Cross Creek agreement which was discarded. It was now clear to me that Pat Neal had a hand producing the false witness (ie: Dale Weidemuller) through arrangement with his close friendship with County Attorney's office. I have never seen a person in such an open manner practice corruption and influence-peddling as Pat Neal has done in Manatee County. Throughout my 22+ years of work experience, during the times when the political climate forced politicians to be honest, I've witnessed dishonest government officials and developers go to jail for much less than the corrupt actions which I've previously described.

18) Mr. Frederick Derr, contactor [sic] and banker, volunteered to be my witness at my post-termination hearing. He had led a group of contractors complaining about Tim Hochuli's management of construction projects and the reluctance for contractors to bid on County projects which was costing the County taxpayer. However, after the postponement of my hearing from March of 2007 to May of 2007, Frederick Derr now declined to attend, giving the excuse that something had come up. Additionally, my hearing in May of 2007 included a surprise addition of Dale Weidemuller of Neal Communities, Inc. as a witness. Only after said hearing did I realize the connection between Frederick Derr and Pat Neal (ie: Neal Communities, Inc.) in that Frederick Derr's withdrawal was due to the fact that Frederick Derr's construction company did a lot of work for Pat Neal's developments and had ongoing projects together.

19) Mr. Charlie Hunsicker, hearing officer, has a very close and long-term relationship with Pat Neal on County projects. The most recent project which Charlie Hunsicker and Pat Neal were working on at the time of my hearing was the Neal Preserve.

20) Mr. Charlie Hunsicker, hearing officer, promised on the record that Defendant Manatee County would render a decision within 30 days of the May 10, 2007, post-termination hearing. Instead, I received it 70 days later.

21) I have applied for around 400 openings in Florida and around the USA since my termination.

Unfortunately after the strong-arm tactics and false references by Manatee County which still continues to this day, my prospects of getting a job are even more remote. The engineering community in my field is relatively small. It is depressing to see individuals who have committed crimes and been in jails all quickly back on their feet and their past conduct excused. County Administrator, Ed Hunzeker, got a job with Manatee County despite the fact that he was fired by Osceola County in 2006 for gross incompetence and serious employee issues.

22) Since being terminated by Manatee County, I have applied to over four-hundred job openings in government entities and private firms regarding engineering, I have had nearly fifty interviews, and I have received four job offers; these job offers were later withdrawn ostensibly as a direct result of disparaging and false information which had been provided by Manatee County.

23) Mr. Charlie Bishop, Inspections Division Manager, under Tim Hochuli, had numerous complaints made against him. His staff noted that Bishop was frequently absent from work for long hours and recorded Bishop doing personal business or spending time at home. Instead of getting fired, Charlie Bishop was transferred in 2007 to another department as a manager with no detriment to his employment record or position.

24) In April 2006, Commissioner Gwen Brown received a serious complaint from Bruce Chiropractic

blaming the County inspector, Allen Farnsworth, for creating a costly construction problem. Dan Gray, John Zimmerman, and Charlie Bishop, who were asked to respond and resolve the complaint, very eagerly turned over the responsibility to me when I volunteered. I made calls, sent emails, and discussed and set up a meeting with all parties involved, and the issue was resolved without costing the County. I informed Charlie Bishop that his staff should be reminded of the proper procedures and re-trained on how to respond properly so as to prevent future re-occurrences of the confusion that Mr. Bishop's inspector, Allen Farnsworth, had created. What was surprising was that shortly thereafter Tim Hochuli, Charlie Bishop, and Sue Sandhoff, as members of the Project Management Employee Standout Recognition Committee, awarded Allen Farnsworth, the first employee recognition award, claiming he had done a wonderful job, contacted all parties including the Commissioner, and resolved it single-handedly; however, the aforementioned claims are completely fictitious. Upon receiving said award, even Allen Farnsworth himself was shocked, exclaiming, in front of everyone who had assembled, that he thought he was going to be fired!

FURTHER THE AFFIANT SAYETH NAUGHT

/s/ Mohan Thampi
MOHAN THAMPI

The foregoing instrument was acknowledged before me this 18th day of June, 2009, by MOHAN

THAMPI, who is personally known to me or who has produced FLORIDA DRIVERS LICENSE as identification.

/s/ Donna J. Niroomand
NOTARY PUBLIC
PRINT NAME: Donna J. Niroomand
State of Florida

My Commission Expires: 11-28-2010

**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

**MOHAN THAMPI,**

**Plaintiff,**

**v.**

**MANATEE COUNTY, a Political Subdivision of the State of Florida,**

**Defendant.**
_____/

**Case No.: 8:07-CV-1445-T-30-JSM-TGW**

**(Filed Jun. 19, 2009)**

**DEFENDANT MANATEE COUNTY'S DISPOSITIVE MOTION FOR SUMMARY JUDGMENT ON COUNTS II AND III OF PLAINTIFF'S THIRD AMENDED COMPLAINT, AND SUPPORTING MEMORANDUM OF LAW**

COMES NOW, Defendant, MANATEE COUNTY, by and through its undersigned counsel, and files this *Dispositive Motion for Summary Judgment* pursuant to Fed. R. Civ. P. 7(B), Fed. R. Civ. P. 56, and Middle District Local Rule 3.01, and in support thereof asserts:

* * *

[34] ***The Sarasota Position***

As to the Sarasota position Thampi had applied for, and for which he claims the County provided "false and defamatory" information in retaliation for his protected activity, the County admits that filing a

Title VII suit constitutes a protected activity. It vigorously disputes any adverse action. Since Hochuli was serving in Iraq soon after Thampi's post-termination hearing, he was never in a position to, nor did he ever, personally give any job references for Thampi to any employer. **Hochuli 32**.

[35] Thampi confirms that the two persons who he alleges gave the "false" information to Sarasota were Utilities Department director Dan Gray and Utility Manager John Zimmerman. **Thampi 72-74**. As to what paperwork he deems "false and defamatory," Thampi points to his termination paperwork, and the decision of the Hearing Officer in his termination appeal. **Thampi 75**. "Its my file. It was a false . . . " **Thampi 111**.

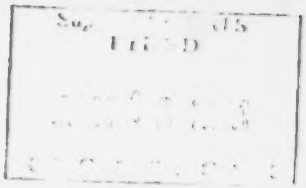
As to the Gray/Zimmerman issue, Gray testified that Mr. Jody Kirkman, Sarasota County's Utilities Planning and Regulatory Manager (**Kirkman 5**) called him sometime in September of 2007, indicating that Thampi had listed him as a reference (**Gray 5**). Gray indicated his surprise, since Thampi had never worked for Gray. Gray declined to give any specific recommendation one way or the other (**Gray 6-7**), and suggested Hochuli would be the best source of information on performance. Likewise, Zimmerman told Kirkman he "didn't really have a lot of close interaction with Mohan [and] didn't assign Mohan tasks and track how he performed on them. And I really felt that I wasn't in a position to make a recommendation on performance." **Zimmerman 11**.

While Kirkman's recollection of his calls to Gray and Zimmerman included some discussion not recalled by Gray or Zimmerman, such as that they would not recommend re-hiring Thampi and that they thought he had performance issues, the differences are not relevant. What is relevant to Thampi's allegations is whether the Manatee officials knew of Thampi's protected activity of filing his lawsuit, and whether they then gave "false and defamatory" information in retaliation for the filing of the suit. As to the first question, neither Gray nor Zimmerman had knowledge of Thampi's lawsuit when Sarasota called (**Gray 22**), (**Zimmerman 35**), and Thampi only has speculation to argue otherwise. And . . .

* * *

179

No. 10-782



In the
# Supreme Court of the United States

MOHAN THAMPI,

*Petitioner*,

v.

MANATEE COUNTY BOARD OF COMMISSIONERS,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF IN OPPOSITION


ROBERT MICHAEL ESCHENFELDER
*Counsel of Record*
DEPUTY COUNTY ATTORNEY
FLORIDA BAR NO.: 0008435
MANATEE COUNTY ATTORNEY'S OFFICE
1112 MANATEE AVENUE WEST, SUITE 969
P.O. BOX 1000
BRADENTON, FLORIDA 34206
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FAX: 941-749-3089
robert.eschenfelder@mymanatee.org

*Counsel for Respondent*


January 10, 2011


Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

## QUESTIONS PRESENTED

ISSUE 1. WAS THE TRIAL COURT REQUIRED TO ENTERTAIN THAMPI'S ARGUMENT THAT THE COUNTY RETALIATED AGAINST HIM FOR HAVING FILED THIS ACTION, WHERE SUCH CLAIM WAS NOT PLED IN THE ORIGINAL OR SUCCESSIVE AMENDED COMPLAINTS?

ISSUE 2. DID THE TRIAL AND APPEALS COURTS ERR IN HOLDING THAT THAMPI'S BEING LISTED BY A 3RD PARTY AS A POTENTIAL WITNESS ON THE 3RD PARTY'S INTERNAL DISCRIMINATION COMPLAINT FORM DID NOT CONSTITUTE SPEECH PROTECTED BY THE FIRST AMENDMENT AND/OR PROTECTED ACTIVITY COVERED BY TITLE VII'S RETALIATION PROHIBITION?

ISSUE 3. DOES ALLEGED IMPARTIALITY OF THE TRIAL COURT JUDGE REQUIRE A REVERSAL OF THE DECISION BELOW?

## LIST OF PARTIES

Manatee County, a political subdivision of the State of Florida (Respondent)

Mohan Thampi (Petitioner)

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## CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THIS CASE BY LOWER COURTS

*Thampi v. Manatee County*, 2008 WL 4145967 (M.D. Fla. 2008)

*Thampi v. Manatee County*, 2009 WL 3762088 (M.D. Fla. 2009)

*Thampi v. Manatee County*, 384 Fed.Appx. 983, 2010 WL 2600638 (11th Cir. 2010)

## CONCISE STATEMENT ON JURISDICTION

Respondent adopts Petitioner's statement of this Court's jurisdiction in this Petition, as set forth in the Petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Respondent adopts Petitioner's statement of the provisions involved in this case, as set forth in Petitioner's Petition.

## STATEMENT OF THE CASE AND MATERIAL FACTS

The Manatee County administration is run by a County Administrator, who reports to the elected Board of County Commissioners. Reporting to the Administrator are a series of department directors overseeing numerous departments which conduct County business.

The Project Management Department (PMD) was one such department. The general functions of the PMD were to oversee contract negotiations for and engineering design and construction of all capital improvement projects, as well as transportation, parks and utilities infrastructure projects including major maintenance. These projects were often valued in the millions to tens-of-millions of dollars. **Thampi 89, Hochuli 41.**[1] The PMD's department director was Tim Hochuli, P.E. Mr. Hochuli received his Masters in Civil Engineering in 1985, and has been a licensed Professional Engineer since 1989. He joined the County in 1997. **Hochuli 6-7.**

Plaintiff Mohan Thampi was employed by Manatee County on July 6, 2004. He was employed as the Projects & Engineering Manager reporting directly to director Hochuli. The position Thampi was hired into was, in fact, the position Hochuli held prior to being promoted to department director. During the interviewing process, numerous candidates were considered for the position, but Hochuli deemed Thampi as the most qualified candidate and selected him. Hochuli did so even though Thampi had informed him (**Thampi 67-68, 86-87**) that he was then

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[1] Rule 12(7) provides "a party may cite or quote from the record, even if it has not been transmitted to this Court." Based on this Rule, Respondent will cite to relevant record citations in this initial opposition Brief though the record is not before the Court. Obviously, if the Petition is granted, any citation made by Respondent will correspond to the record. Since name references may be helpful to identify which witness's testimony is being referenced, the County will reference same by the name of the affiant/deponent (all part of Doc. 59 of the record below), and the cited page number(s).

suing his former employer, Collier County, in federal court.[2]

According to the job description (Attachment 2 to Doc. 59: ***Exhibit 1, McDonald affidavit***), Thampi's position as Projects & Engineering Manager was a "high level management" position requiring the ability to provide "direction to staff during the planning, design, land acquisition and construction phases of public infrastructure projects to assure quality projects are produced in a timely and cost effective manner." The position contemplated performance of the work "with a high level of independence" and performance would be reviewed for results obtained, including "timeliness." The position description also indicates the incumbent was required to "maintain effective working relationships with others" and to "efficiently handle multiple projects at the same time in a timely and appropriate manner."

Thampi confirms he was in charge of the largest division within the PMD, overseeing 45 employees. He states, "most of the work which was happening came through me..." Thampi also participated in "over two hundred" interviews and he directly hired "at least 20" employees for the County, including at least one junior manager. **Thampi 30-32**. He was responsible for the

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[2] Thampi sued his former employer, Collier County, in 2004 for violation of the First Amendment based on his claimed criticism of that County. On March 5, 2007, the court entered summary judgment for the County in ***Thampi v. Collier County Bd. of Comm'rs*, 510 F.Supp.2d 838 (M.D.Fla. 2007)**; affd., **273 Fed. Appx. 836 (11th Cir. 2008)**; *rehearing and rehearing en banc denied*, **285 Fed. Appx. 741 (11th Cir. 2008)**; *cert. denied*, **129 S.Ct. 1040, 173 L.Ed.2d 469 (2009)**.

operational areas of projects management, plan review, survey, locates, records, and engineering design. As his employment began, Thampi confirmed that Hochuli had "full confidence in me" (**Thampi 22**), and allowed Thampi to oversee important matters such as contract and project negotiations on his own. **Thampi 22, 24**.

Also working within the Project Management Department was an administrative assistant named Deloris Crockett. Crockett had worked for various other County departments before moving to PMD, where she was the secretary for then PMD director Janet McAfee. **Crockett 21**. When McAfee resigned the position in 2004, Hochuli, who had held the position Thampi was ultimately hired into, was made interim and eventually permanent director. After working with Ms. Crockett for some time and not being satisfied with her performance, Hochuli decided to re-assign her to other support duties in the office and assigned another support staff worker, Marlene Marlatt, to be his assistant. Marlatt had been Hochuli's assistant prior to his promotion.

While Crockett, who is African American, lost no pay or seniority in the change (**Crockett 23**), she felt the change diminished her status. She also had a list of other items she didn't like, including her feeling that other ladies in the office wouldn't invite her to lunch, that Hochuli had once called her by her last name rather than her first, and that her work and conduct, such as personal visits or phone calls, were nit-picked more than other support staff in the office.

Section XIII of the Manatee County Commission's Personnel Policy bans workplace discrimination based

on the various federally-protected classes. The Policy (Attachment 3 to Doc. 59: ***Exhibit 13,*** *Garcia affidavit*) also provides for a procedure whereby any employee or applicant who feels he or she is being illegally discriminated against may complain and obtain an investigation by the County. The Policy provides that any complaint shall be made in writing to one of the managers in the County's Human Resources Department (HR). If an investigation is warranted, the County Administrator appoints one or more investigators to investigate. The policy specifies that all employees "are obligated to cooperate in a full and honest manner" with investigators. Once an investigation is completed, a report with findings and any recommended actions is provided to the County Administrator for consideration and adoption.

As was her right, Crockett filed a discrimination complaint on the official Manatee County Complaint of Illegal Harassment or Discrimination form (Attachment 3 to Doc. 59: ***Exhibit 14,*** *Garcia affidavit*) on January 19, 2007. The form, which requires various information to be included so as to help the complaining party and the investigators clarify the complaint and supporting information, asks the complaining party to identify witnesses who the party believes may have knowledge about the incident(s) described. Crockett listed four names, including Thampi. She did not list on the form what information she believed any of the witnesses would provide.

Pursuant to the Florida Public Records Act, all records of an agency related to an investigation of discrimination are confidential until the investigation is concluded. Therefore, internal discrimination

investigations by Manatee County's HR department are conducted in a confidential manner until the Administrator renders a decision adopting a final investigative report. **Garcia 9**. One of the first steps taken after HR is assigned to investigate a complaint is a notification memorandum sent to the department director notifying him or her, in general, that an investigation will occur. On February 2, 2007, Senior HR Manager Dale Garcia, who along with HR Analyst Garnet McDonald[3] had been appointed by the County Administrator to investigate the Crockett complaint, sent a Notification of Section XIII Investigation memorandum (Attachment 3 to Doc. 59: ***Exhibit 15***, *Garcia affidavit)* to director Hochuli. The memorandum provides no detail whatsoever as to who may have filed the complaint other than "an employee from your department." The memorandum reviews with the director the need to control rumors during the process, cooperate with the work of the investigators, and ensure no intimidation occurs. The memorandum also states:

> **What can I as Director Know?** Given the confidential nature of investigations under Section XIII, investigators will limit what information is released prior to the investigation being completed. Indeed, depending on the nature of the charges and identity of the accused, an investigator may elect not to share information even with a

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[3] Both investigators have significant experience investigating such complaints, and Garcia holds a Masters degree in Human Resources Management, and has received specific training on discrimination law and complaint investigation (**Garcia 39**).

> department director. Directors are asked not to take such lack of sharing personally as it is being done only to ensure the investigation's integrity. Be assured that the investigators will keep the director as informed as possible about the course and scope of the investigation as it proceeds.

And

> **Confidentiality** Florida law and County policy both state that investigations into illegal harassment or discrimination are confidential and the records exempt from disclosure prior to a final report being adopted. Therefore, department directors, managers or others are asked not to request copies of witness statements or other evidence. During the interview process, witnesses are informed that their statements are confidential until the investigation is complete and that they are not to discuss their testimony with anyone after the interview is over. It is up to the department director to help the County reinforce this right by refraining from, and instructing all subordinate staff to refrain from, asking persons who have been interviewed about what happened during the interview...

The only other person copied on this memorandum is the County Administrator. After this "launch memo" is sent, and the investigators map out the course of their investigation, record reviews and interviews are conducted. In the Crockett matter, by the time the investigators sought to schedule Thampi to be interviewed, he had already been terminated.

Nevertheless, the investigators did obtain an interview with Thampi on March 1, 2007, wherein they conducted a recorded interview with him. Pursuant to standard County practice, his interview was reduced to writing and he was able to review, correct and sign it. Thampi's statement in the Crockett matter (Attachment 3 to Doc. 59: ***Exhibit 16,*** *Garcia affidavit*) basically supported Crockett's assertion that she was doing her job. Thampi intimated that Crockett was assigned different duties so that Marlatt, who had a friendship with Hochuli, could continue to be his secretary. When asked if he felt the things Crockett complained of had occurred to her because of her race, he opined, "yes, now that you ask me." When asked why he felt so, he only offered his view that 'she is African-American, she was doing her job, and so what else could it be?'

On June 5, 2007, the investigators issued their recommended final report on Crockett's complaint to the County Administrator. The 28 page report reviewed in detail each issue raised by Crockett. It concluded that while there was no evidence of race discrimination, either as to Hochuli's change of duties between Crockett and Marlatt or the various other office/co-worker interaction issues, Hochuli should have given Crockett more time and specific feedback on her performance issues before changing her title and duties. On July 13, 2007, the County Administrator adopted the report and recommendations. (Attachment 3 to Doc. 59: ***Exhibit 17,*** *report and Administrator's adoption letter, Garcia affidavit*).

Within a year of being hired, Thampi began to need detailed guidance from Hochuli. In his July 2005

performance evaluation, Hochuli wrote, in relevant part:

> Mohan's responsibility has been to decrease the actual time taken for development reviews. However, despite providing additional resources for development review, the review time period has not decreased significantly. *** This needs to be a priority over the upcoming period. *** Also, a contractor completion tracking tool has been developed and this needs to be updated on a regular basis, probably weekly...Mohan needs to perform this updating and follow-up of the status of the necessary paperwork associated with construction completion dates.

(Attachment 2 to Doc. 59: ***Exhibit 2, McDonald affidavit***). Additionally, in the fall of 2005, Hochuli also discovered for the first time that Thampi had been less than candid when reviewing his job history when he applied to the County. On September 8, 2005, Collier County deposed Hochuli (Doc. 59, attachment 5) related to Thampi's suit against it. Hochuli learned during this deposition that Thampi had been dismissed and/or asked to resign from several prior positions which he had not correctly represented in his Manatee County application. In spite of obtaining information which could have led to the dismissal of Thampi, Hochuli decided to allow him to remain employed.

On December 22, 2005, Thampi was issued an Employee Warning/ Counseling form (Attachment 2 to Doc. 59: ***Exhibit 3, McDonald affidavit***). The form noted that Thampi continued to use his County computer to access internet sites for personal purposes

not needed for the performance of his duties (a matter the form notes had been discussed with him "on at least two prior occasions"). Hochuli also admonished Thampi in the form that he was "arriving late to work on most mornings," which Hochuli noted "set a bad example" for Thampi's subordinates.

On February 21, 2006, Thampi received a Notice of Disciplinary Action for failing to comply with the County's computer and internet use policies, insubordination by refusal to comply with instructions and conducting personal business during duty hours (Attachment 2 to Doc. 59: ***Exhibit 4, McDonald affidavit***). The basis of this notice was that the County's computer security staff had provided Hochuli with internet use history which showed Thampi again using his internet for "personal banking" and "personal shopping" on multiple sites. Hochuli noted again that he had verbally counseled Thampi on this matter previously, and had issued a warning notice again specifically instructing Thampi to refrain from this behavior. Hochuli found the continuing personal use had become insubordinate, and he commented in his notice that while the sites Thampi were visiting were not illegal or illicit, "as a high-level manager, Mohan must be expected to follow County rules, set a proper example for his and other employees and follow the instructions of supervisors without continuous follow-up. I must be able to trust that my instructions will be followed by the high-level managers reporting to me..." While this was a formal discipline notice, Thampi did not receive any unpaid suspension period.

In his July 2006 evaluation of Thampi (Attachment 2 to Doc. 59: ***Exhibit 5, McDonald affidavit***), director Hochuli found that while Thampi was performing to

the minimal standards of his position generally, he failed to meet expectations in the managerial evaluation category of development of assigned staff. In his written comments, Hochuli noted:

> Mohan needs to show initiative and leadership in working with the various PMs [Project Managers who were Thampi's subordinates]. While it has been important to concentrate his efforts in the plan review section, more time needs to be spent providing input and assistance on capital projects. He also needs to ensure that timely responses...are provided to County and outside staff. At times, Mohan over-delegates his workload and needs to directly address the issue in question. Even at the division manager level, we need to take on work beyond that of strictly a supervisory nature. Mohan needs to establish deadlines for his staff for all development review projects and track and discuss those deadlines with staff. This has not taken place during the period, as requested in the last [evaluation].

About a month later, on August 23, 2006, Hochuli issued Thampi another Warning/Counseling form. In the lengthy discussion of specific performance issues (Attachment 2 to Doc. 59: ***Exhibit 6***, *McDonald affidavit*), Hochuli notes Thampi's failure to provide specific and accurate comments on projects, and to follow up, and ensure subordinate project managers follow up, on projects nearing completion. He lists numerous projects and the issues related to them as examples, and concludes:

> All of these issues have either been discussed verbally with Mohan or indicated on previous mark-ups of these spreadsheets that have been given to Mohan. Addressing these issues is Mohan's responsibility as indicated in his Position Description and as discussed verbally with him on numerous occasions. Addressing these matters needs to take place immediately.

On August 23, 2006, Thampi received another Notice of Disciplinary Action (Attachment 2 to Doc. 59: ***Exhibit 7, McDonald affidavit***) for insubordination. In it, director Hochuli states:

> As part of his last two annual [evaluations], comments on Mohan's performance included asking him to establish deadlines for his staff for all development review projects and track and discuss those deadlines with staff. This has not taken place despite being included in these [evaluations] and other verbal discussions... *** In addition...I followed up on the subject with Mohan in early August, 2006, via e mail asking "what is the timetable for implementation and the method of tracking that you will use for the review deadlines in the planning group?" I have not been provided with a response.

Inasmuch as the situation was still not improving, and since Thampi's frequent response to Hochuli would be to assert a lack of detailed direction on *exactly* what to do, and *exactly* which staff should do what, Hochuli issued a memorandum (Attachment 2 to Doc. 59: ***Exhibit 8, McDonald affidavit***) to several staffers, including Thampi, on December 5, 2006. The

memorandum (which effectively is the tracking plan detail Hochuli was looking for Thampi to develop) breaks down, in detail, who will do what, and gives Thampi overall "responsibility for tracking all project deadlines and following up with the project managers, as needed, on each deadline." In addition to the evaluations and discipline notices reviewed above, Hochuli also communicated regularly to Thampi by e mail concerning his performance deficiencies. The composite ***Exhibit 19*** of the *Underwood affidavit* (Attachment 4 to Doc. 59) demonstrates, beginning in December of 2005 through October of 2006, various e mail messages where Hochuli raises these issues with Thampi, and/or where others note deficiencies or communications issues with him.

By late January 2007, Hochuli determined that he had tried long enough to obtain the type of performance he needed from Thampi, one of his senior division managers. Therefore, on January 30, 2007, he issued Thampi a written pre-termination letter (Attachment 2 to Doc. 59: ***Exhibit 9***, *McDonald affidavit*), informing him he was being considered for termination due to incompetence and inefficiency, insubordination, conducting personal business during duty hours, and productivity and workmanship not up to required standards of performance. In the letter, Hochuli reviews the history of his efforts to get Thampi to track, monitor, and follow up on projects. However, he notes that while Thampi produced a spreadsheet of projects in late December, he:

> did not include dozens of projects which should have been included. A comparison of the calendar submitted to our active project list resulted in the finding that many projects that

> could have easily been included were not included. This once again illustrates that either you are not familiar with our capital projects after having 2 ½ years to get familiar with them or you simply could not provide a satisfactory work product on this assignment. Either of these situations is not acceptable in the operation of this department.

The pre-termination letter also reviews the history of Hochuli's still-unsuccessful efforts to get Thampi to review all consultant work and provide the detailed comments needed which could only come from an engineer (which Thampi was) and not non-engineer project managers. The letter also cites Thampi's lack of responsiveness, both to County staff and outside parties doing business with the department. Finally, it notes that County computer records confirmed Thampi was still using County internet access for non-business reasons.

Hochuli met with Thampi on these matters on the same day as he issued the pre-termination letter. It is standard practice in the County to place an employee on administrative leave once a pre-termination letter is issued (**Garcia 42**), and per this practice, Thampi was sent home after his meeting to await Hochuli's final decision. Thampi sought time to develop a written response to the letter, which Hochuli granted. Thereafter, on February 2, 2007, Thampi submitted an eight page rebuttal (Attachment 2 to Doc. 59: ***Exhibit 10, McDonald affidavit***) with exhibits attached. The rebuttal indicated Thampi took no blame whatsoever for any issues raised by Hochuli. It does reveal that at the time of his termination, Thampi believed he was being terminated not in retaliation for having been

listed in Crockett's internal complaint as a possible witness, but instead, as outlined in the second to last paragraph of the submission: "the primary motive to try to terminate me has been that you had long promised [PMD employee] Tod Phinney the position as Projects and Engineering Division Manager." After considering Thampi's submission, Hochuli made his final decision to terminate Thampi, which he did by issuing a termination notice (Attachment 2 to Doc. 59: ***Exhibit 11, McDonald affidavit***) on February 12, 2007. The notice cited the same personnel rules as were noted in the pre-termination letter as the rules violated. The notice provides a little over three single-spaced pages of detailed discussion concerning Thampi's performance issues and history of failing to comply with instructions from Hochuli, and concludes:

> It is greatly dismaying to me, and somewhat ironic, that you are now offering various theories of why I want to get rid of you, when I was the person who hired you over other candidates in the first place. Indeed, I have given you credit where it was due, such as always admitting your great professional knowledge in your chosen field. However, you can have all the knowledge in the world but it will not be adequate if not joined by a positive attitude, sufficient communication skills, and a strong work ethic. Since I have tried repeatedly over time, as reviewed herein, to work with you to improve your performance, and since that has failed to work, I have no choice but to terminate you. Managers are held to a higher standard than lower ranking employees and I simply can't spend any more of my time trying to work

with you. I wish you the best of luck in your future endeavors.

Manatee County has a detailed written policy providing for a post-termination appeal process for employees who are not classified as serving at the will of the Administrator or County Attorney. Pursuant to this policy, Appellant Thampi submitted a request for a post-termination hearing before a Hearing Officer. A two day hearing was scheduled and heard for Thampi on May 10 & 11, 2007.

During Thampi's hearing, at which he was represented by legal counsel who also represents him in this litigation, Mr. Thampi was entitled to, and did, call witnesses, introduce evidence, cross-examine the County's witnesses, and make arguments to the Hearing Officer. The Hearing Officer took the matter under advisement and rendered his eight page recommended order upholding the termination to the County Administrator on July 18, 2007. The County Administrator adopted the order as his own on July 20, 2007. (Attachment 2 to Doc. 59: ***Exhibit 12***, *copy of order and adoption letter, McDonald affidavit*) Under the County's policies, this was the final quasi-judicial act on the part of the County. It is undisputed that thereafter, Thampi filed a timely charge of ethnic discrimination and retaliation with the EEOC, and received a dismissal and right to sue, resulting in the lawsuit below, but not alleging ethnicity discrimination.

Hochuli was and is a Major in the Army Reserves. **Hochuli 8-9**. Hochuli was issued orders related to the Iraq War, and on May 29, 2007, he ceased reporting to work and instead reported for duty, first to a U.S.

base, then on to Iraq. Hochuli's Army duties ended in August of 2008, and after a rest period he re-joined the County's employ. **Hochuli 36**.

However, by the time he returned, the new County Administrator had made the decision to overhaul his administration, and several departments were eliminated, while others were created. According to Crockett: "The County was doing a reorganization that affected every department." **Crockett 23**. As a part of this effort, the PMD no longer existed and its functions had been assigned to other departments, with the majority being transferred to the Public Works department. Hochuli now serves as one of several deputy directors in that new department. **Hochuli 37**. As a result of this same re-organization, Crockett transferred to the Property Management Department, where she thereafter worked as Administrative Support Coordinator. **Crockett 23**.

While still working for the County, Thampi applied for a position with Sarasota County government. Since Hochuli was serving in Iraq soon after Thampi's post-termination hearing, he was never in a position to, nor did he ever, personally give any job references for Thampi to any employer. **Hochuli 32**. Thampi listed several other County staff as references, including Utilities Department director Dan Gray and Utility Manager John Zimmerman. Thampi confirmed that it was these two persons who he alleges gave "false" information to Sarasota County. **Thampi 72-74**. The paperwork he deemed "false and defamatory" was his termination paperwork, and the decision of the Hearing Officer in his termination appeal. **Thampi 75**. "Its my file. It was...false..." **Thampi 111**.

As to the reference call, Gray testified that Mr. Jody Kirkman, Sarasota County's Utilities Planning and Regulatory Manager (**Kirkman 5**) called him sometime in September of 2007, indicating that Thampi had listed him as a reference (**Gray 5**). Gray indicated his surprise, since Thampi had never worked for Gray. Gray declined to give any specific recommendation one way or the other (**Gray 6-7**), and suggested Hochuli would be the best source of information on performance. Likewise, Zimmerman told Kirkman he "didn't really have a lot of close interaction with Mohan [and] didn't assign Mohan tasks and track how he performed on them. And I really felt that I wasn't in a position to make a recommendation on performance." **Zimmerman 11**.

While Kirkman's recollection of his calls to Gray and Zimmerman included some discussion not recalled by Gray or Zimmerman, such as that they would not recommend re-hiring Thampi and that they thought he had performance issues, both Manatee officials confirmed that at the time of the reference call, they had no knowledge that Thampi had filed a lawsuit (**Gray 22**), (**Zimmerman 35**). According to Kirkman, the official from Sarasota: "Both basically told me they did not supervise Mr. Thampi" (**Kirkman 15**), "They were very clear that they did not supervise Mr. Thampi" (**Kirkman 43**), and "they did not" mention anything about a Thampi lawsuit (**Kirkman 48**). In fact, as of the date of his deposition in this case, Kirkman had still not ever even seen a copy of Thampi's suit, or what it alleged (**Kirkman 48-49**).

On September 14, 2007, and presumably as part of its reference check process, a representative of the Sarasota County personnel office sent an e mail to

Manatee County's Human Resources director Garry Dye, asking for copies of Thampi's personnel records (Attachment 4 to Doc. 59: **Exhibit 21**, *affidavit of Underwood*). Based on Sarasota County's request, Manatee County's Human Resources Department copied Thampi's file, which was personally picked up by Mr. Kirkman, the official in Sarasota's utilities department who was going to decide whether to complete the hiring process (**Kirkman 13**). On the day Kirkman picked up the file copy, he confirms he had no verbal interactions with anyone in Manatee County's HR office: "From what I recall, I just went to the front desk and they handed me the package...and I left." (**Kirkman 45-46**). Kirkman confirms that by this time, he had already interviewed Thampi, that the interview "went well" and that he had already made a conditional offer of employment to Thampi, subject to reference checks (**Kirkman 8-10**). Kirkman confirms that Sarasota County's HR department requested public records of Thampi's personnel file from Manatee and Collier Counties (**Kirkman 11, 26**), and that once he reviewed the records he obtained, he decided not to proceed with the hiring of Thampi:

> I needed an individual that could perform. I was really concerned after I started getting into both reference checks and just looking at the information we got from Collier and Manatee. I felt this incumbent may have not performed in the manner we needed in that position.

**Kirkman 11-12**. He confirms that he based his decision to withdraw the conditional offer not only on the negative performance information in the Manatee file, but also on the negative information in the Collier files (**Kirkman 50**).

## ARGUMENT AND AUTHORITIES

**ISSUE 1. WAS THE LOWER COURT REQUIRED TO ENTERTAIN THAMPI'S ARGUMENT THAT THE COUNTY RETALIATED AGAINST HIM FOR HAVING FILED THIS ACTION, WHERE SUCH CLAIM WAS NOT PLED IN THE ORIGINAL OR SUCCESSIVE AMENDED COMPLAINTS?**

Thampi filed his original *Complaint* against the County on August 15, 2007. Doc. 1. It was a one count complaint invoking 42 U.S.C. § 1983, alleging the County did not provide Thampi procedural due process related to his termination proceedings. Thampi filed his first *Amended Complaint* on September 24, 2007. Doc. 9. It contains two counts, the original procedural due process claim, joined by a new substantive due process claim.

On April 29, 2008, the lower court granted Thampi's motion to file a *Second Amended Complaint*, and deemed it filed on that date. Doc 33. In it, Thampi maintains a procedural due process claim, drops the substantive due process claim, and for the first time adds a count asserting First Amendment retaliation. Each count invokes 42 U.S.C. § 1983. In this *Second Amended Complaint*, Thampi alleges, at ¶ 56, that the County provided false or defamatory information to a potential employer "in further retaliation for Plaintiff having exercised his First Amendment rights for being a witness" [in the internal County investigation]. He further confirms in ¶ 57 that he felt his "stepping forward as a witness" was the First Amendment "speech" over which the County allegedly retaliated against him by terminating him.

On July 21, 2008, Thampi files his *Third Amended Complaint*. Doc. 39. In it, he retains his due process and First Amendment claims, and adds a count invoking the anti-retaliation provision of Title VII. As in his prior Complaint, Thampi again alleges, at ¶ 56, that the County provided false or defamatory information to a potential employer "in further retaliation for Plaintiff having exercised his First Amendment rights for being a witness" [in the internal County investigation]. And again notes, in ¶ 57, that he felt his "stepping forward as a witness" was the First Amendment "speech" which was the cause of the County's alleged retaliation against him. In addressing his Title VII retaliation claim, Thampi re-alleges the paragraphs of the Complaint supporting the First Amendment retaliation count, including ¶ 56 and ¶ 57 (concerning his status as a listed witness in the internal complaint of the co-worker). While he does not directly allege the "Title VII protected activity" supporting his Title VII retaliation count, Thampi does allude, at ¶ 59, to his "participation as a witness" for his co-worker as the protected activity at issue. Nowhere in any of the Complaints does Thampi allege the filing of his lawsuit in this case resulted in retaliation (either in First Amendment or Title VII guise), nor even make passing mention of filing a lawsuit as his protected activity.

In its discussion with Thampi's counsel on the issue of whether he had sufficiently pled a cause of action for retaliation based on the filing of his lawsuit, the trial court no doubt was referring to the Supreme Court's decision in ***Ashcroft v. Iqbal*, ---U.S.---, 129 S.Ct. 1937, 173 L.Ed. 868 (2009)**, adopting a more stringent standard for civil rights pleadings to satisfy the requirements of Rule 8. However, as shown by the

earlier review of Thampi's various Complaints, that discussion was somewhat academic, because at least as to Title VII retaliation, the County could not, as a matter of law, have retaliated against him in September of 2007 (by giving the alleged "false and defamatory" reference information to a potential employer) in retaliation for exercising the right to file a Title VII lawsuit (clearly a protected activity) in August of 2007. That is because, in August of 2007, Thampi had not sued the County *for a violation of Title VII*. He had only sued the County for a violation of due process, invoking 42 U.S.C. § 1983. The first Complaint to mention a Title VII violation was Thampi's *Third Amended Complaint*, filed July 21, 2008, 10 months *after* the County gave Thampi's personnel file to Sarasota County per its request. An employer cannot retaliate against an employee for a Title VII protected activity the employee has not yet engaged in. Thus, even if the trial court had agreed, based on nothing more than oral argument at the summary judgment hearing, to consider the 2007 reference as an alleged act of retaliation for having exercised the right to file a Title VII lawsuit, there would still not have been a legal basis to deny the County's summary judgment motion. That is so since the alleged adverse action (the allegedly defamatory information given to the potential new employer) occurred well *before* the filing of a Title VII lawsuit.

Even setting aside these arguments, Thampi's pleadings never raised this new, distinct, different-in-time allegation of Title VII retaliation to the EEOC, as required. He also never argued the point in his own *Motion for Summary Judgment*, and never filed a motion to file a fourth amended complaint seeking to

add this issue. For these reasons also, Thampi's Petition on this point should be denied.

**Issue 2. DID THE TRIAL AND APPELLATE COURTS ERR IN HOLDING THAT THAMPI'S BEING LISTED BY A 3RD PARTY AS A POTENTIAL WITNESS ON THE 3RD PARTY'S INTERNAL DISCRIMINATION COMPLAINT FORM DID NOT CONSTITUTE SPEECH PROTECTED BY THE FIRST AMENDMENT AND/OR PROTECTED ACTIVITY COVERED BY TITLE VII'S RETALIATION PROHIBITION?**

The second issue raised by Thampi essentially asks the Court to rule that a third party public employee co-worker's independent act of listing the employee as a potential witness on an internal discrimination complaint form, with no accompanying verbal or physical act on the part of, or foreknowledge by, the employee, results in speech protected by the First Amendment, and/or protected activity under Title VII's anti-retaliation provision. Such a ruling would expand the concept of speech and protected activity to absurd levels. The following argument as to each legal theory will demonstrate not only that Thampi's position is legally unsupported, but also that the lower courts rested their decisions as to the two counts at issue on several grounds, and that since those alternative grounds were not challenged on appeal, granting the Petition would only result in an advisory opinion.

***First Amendment Retaliation***

As to his First Amendment claim, Thampi states that at the time he was terminated, he was "at the very least...a potential witness" in the County's internal investigation of a discrimination complaint of

another County employee (¶ 52), that "merely being a potential witness in proceedings addressing discrimination claims can give rise to First Amendment retaliation claims" (¶ 51), and that "identification or participation as a witness in such a proceeding is a matter of public concern" (¶ 53). To establish retaliation in the public employment context, a plaintiff must first prove he or she spoke on a matter of public concern. ***Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)**. A "public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." ***Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986)**. Whether the employee spoke on a matter of public concern is a question of law for the court. ***Morris v. Crow*, 117 F.3d 449, 455 (11th Cir. 1997)**. Respondent contends Thampi never "spoke" for First Amendment retaliation purposes, and that even if someone else listing you as a witness on an internal complaint form were "speech" on the part of the person being listed, such "speech" was not on a matter of "public concern." While First Amendment jurisprudence expands the original focus of the amendment to cover "exotic" dancers and flag-burners, bestowing constitutional protection to someone who said nothing, and did nothing, and in fact didn't even wish to say or do anything, would be too significant a departure from the amendment's intent. Thampi doesn't cite to even one case supporting his position, and this Court should hold that his being listed on the complaint form simply wasn't speech on his part.

Even assuming, *arguendo*, that this listing was First Amendment speech, it nevertheless was not on a matter of public concern. To determine whether

speech is on a matter of public concern, a court will consider "the content, form and context of a given statement, as revealed by the whole record." As the Eleventh Circuit's opinion in this case pointed out, since there were no words or deeds, there is no "content, form or context" to examine.

As to whether Thampi sought to present his "speech" to the general public, he clearly did not: "Delores had come to me when she was getting harassed and stressed and asked me...you know, my advice; and I told her, try to work it out with Tim [Hochuli]." **Thampi 56-57**. However, Crockett decided to file an internal complaint instead. When she informed Thampi that she had done so and already listed him as a witness, Thampi reacted thus: "I was sitting there and saying, Delores, leave—try to leave me out of this because—self-preservation..." **Thampi 57**. While the record confirms Thampi eventually agreed to an interview request from HR (after he'd already been terminated), clearly, at the time Crockett filed her complaint, Thampi had no desire to voice anything to HR, let alone to the public at large. Being listed by someone else as a potential witness isn't speech "on a matter of public concern" and even if Thampi had given his statement to the investigators before the alleged retaliatory termination (which he didn't), compliance with an internal investigative process which employees are required to cooperate with simply does not have the content, form or context needed for protected First Amendment expression. Rather, it fits within the type of speech related to an employee's duties (in this case to cooperate in an internal investigation). See, ***Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993)**(complaints of sexual harassment

made only to official bodies where concerns not related to the public were not of public concern).

Even if one assumes, *arguendo*, that Hochuli: 1) knew Thampi had been listed as a witness on the complaint form, 2) drew some conclusion that Thampi would state something to a public audience (not HR) which may satisfy the "matter of public concern" test, and 3) terminated him based on this mistaken belief, this *still* does not create a First Amendment violation because, as of the date Hochuli made his termination decision, Thampi had not in fact given any statement to anyone. As one case has noted, "The First Amendment affords no protection to speech that the employee did not actually utter." ***Blickley v. Ford*, 2009 WL 856638 (M.D. Fla. March 30, 2009)**(holding that as a matter of law, to the extent the plaintiff was fired because of a mistaken belief as to what speech she *may have* engaged in, she had no constitutional claim).

### *Title VII Retaliation*

As to his Title VII retaliation count, Thampi alleges in his *Third Amended Complaint* that the investigation in which he was a witness was "pursuant to an investigation in compliance with Title VII" (¶ 59), and that his being a witness in the investigation constitutes opposition to discrimination and/or participation in a Title VII proceeding (¶ 60). Thampi alleges in his Petition that the County's termination of him, and alleged provision of false information to Sarasota County related to his job application, constitute Title VII retaliation.

To establish a prima facie case of Title VII retaliation, a plaintiff must show that he: 1) engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding, 2) suffered an adverse employment action simultaneously with or subsequent to such opposition or participation, and 3) a causal connection exists between the protected activity and the adverse employment action. While Thampi's February 12, 2007, termination was an adverse action, he had not as of that date engaged in protected activity, and thus could not establish the required connection. Thampi is not covered by the "opposition clause" because: 1) the mere fact that Thampi was listed by Crockett as a witness does not translate into opposition by Thampi, and 2) even assuming, *arguendo*, that it did, Thampi's belief that Crockett was being racially discriminated against was not objectively reasonable.

In ***Crawford v. Metro. Govt. of Nashville, et al.*, --- U.S. ---, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009)**, the Court decided the opposition clause extends to an employee who speaks about discrimination not of his or her own initiative, but by answering questions during an employer's internal investigation. In ***Crawford***, the HR investigator asked her whether she had witnessed sexually harassing conduct by a supervisor, which she confirmed in detail. This Court concluded that by doing so, she was "opposing" a Title VII violation.

In contrast, Thampi not only made no overt attempt to oppose what he may have felt was discrimination against Ms. Crockett (he confirms he "never brought anything up" to Hochuli, and did not approach the County Administrator with any concerns

(**Thampi 123-24**)), he didn't even provide a statement at the request of HR investigators until March 2007, when he was no longer employed by the County. **Thampi 124**.

In the concurring opinion in ***Crawford***, it was noted that the decision did not convert "silent opposition" into a protected Title VII act, but rather still required testifying concerning discrimination, even if such testimony came at the behest of investigators rather than on the employee's own initiative, and that: "The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case." ***Crawford*, 129 S.Ct. at 854-55**. Since Thampi engaged in no "purposive conduct" while employed with the County, he cannot be found to have "opposed" anything.

Thampi's Petition asserts the Eleventh Circuit's opinion creates a post-***Crawford*** "circuit split" on this issue, citing ***Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009)** and ***Collazo v. Bristol-Myers Squibb*, 617 F.3d 39 (1st Cir. 2010)**. However, no split is present. In ***Thompson*** (currently under review in this Court), the Sixth Circuit ruled that an employee terminated after his fiancée filed an EEOC charge, but who himself did nothing regarding the charge, was not protected under Title VII's anti-retaliation provision. This case concerns the focused question of whether Title VII covers "friends or family members retaliation", and its facts are clearly distinguished from those in this case.

In ***Collazo***, the court ruled that a supervisory employee who assisted another employee in asserting an internal harassment claim was protected when he was subsequently fired. However, in that case, Mr. Collazo spoke to the alleged harasser directly, arranged a meeting for the victim with the company's HR staff and attended the meeting, sent a follow up e mail to HR confirming his view that this was a serious issue, and two days later, went again with the victim to HR to press the charges to HR. Respondent believes this post-***Crawford*** case was correctly decided. Clearly Mr. Collazo took many open overt steps (purposive action) to help the victim press her charge. But unlike that case, Thampi stated his distress at having had his name listed as a witness, and confirmed he did not speak to anyone about the matter until well after he had been terminated.

***Petition Can Only Result in an Advisory Opinion***

An appeals court will generally affirm the decision below if it is sustainable on any legal ground or theory apparent on the record. The reviewing court is concerned with the correctness of the action of the trial court, without regard to the reasons motivating the lower court. ***Burget v. Union Pacific R. Co.*, 240 F.2d 207 (8th Cir. 1957)**. A federal appeals court may this affirm on any grounds supported by the record below, even though such differs from that which was assigned by the trial court. ***Hutchison v. Pfeil*, 208 F.3d 1180 (10th Cir. 2000)**. See generally 36 C.J.S. Federal Courts § 586. Similarly, where a ruling on one aspect of a lower court's justification could not affect the judgment because there was an independent sufficient basis for that judgment, the Supreme Court

has refrained from exercising jurisdiction since any ruling would amount to a mere advisory opinion. ***Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).**

In addition to finding no protected activity, the lower courts also found that Thampi could not demonstrate the required causal connection. Thampi did not appeal this issue either to the Eleventh Circuit or in this *Petition*. Thampi is unable to establish a causal connection between his statement to the HR investigators and his termination since the former was given well *after* the latter, and you cannot retaliate against someone for something which has not yet occurred. See, for instance, ***Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 529-30 (6th Cir. 2008).**

While Thampi would postulate that Hochuli must have known at least that he had been listed as a witness for someone else's complaint since someone in HR must have told him, the trial court was correct to conclude this was not supported by the record Thampi helped develop. Thampi adduced no record evidence to support this theory and, as the trial court found, the record showed the contrary, that Hochuli never saw the complaint form, nor knew of Thampi's having been listed as one of several possible witnesses. This "*must have known*" line of reasoning is also rejected in the Eleventh Circuit. See, ***Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 791-92 (11th Cir. 1992); *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999); *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 799 (11th Cir. 2000); and *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1156 (11th Cir. 2002).**

The trial court also found that even if Thampi had stated a prima facie case, he could not overcome the County's stated legitimate, non-discriminatory reasons for his termination. Since these alternative holdings were not appealed to the Eleventh Circuit, and are not part of the *Petition* before this Court, the *Petition* must be denied as it could only result in an advisory opinion.

**ISSUE 3. DOES ALLEGED IMPARTIALITY OF THE LOWER TRIBUNAL REQUIRE A REVERSAL OF THE DECISION BELOW?**

The final issue raised by Thampi concerns his belief that the trial judge should have recused himself due to prejudice/hostility against his counsel. Respondent believes the Eleventh Circuit's disposition of this matter was wholly correct, and no further argument is needed to support denying this part of the Petition.

## CONCLUSION

Respondent Manatee County respectfully requests the Petition be denied.

Respectfully submitted,

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No. 10-782

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In The

# Supreme Court of the United States

MOHAN THAMPI,

*Petitioner,*

v.

MANATEE COUNTY BOARD OF COMMISSIONERS,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF

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## INTRODUCTION

In its brief in opposition, the county raises new arguments on whether Mr. Thampi pled a retaliation claim, discusses so-called confidentiality procedures, and accuses Thampi of widespread misconduct. All are extremely misleading and false and raise genuine issues of material fact.

## THAMPI ADEQUATELY PUT THE COUNTY ON NOTICE THAT HE PLED A RETALIATION CLAIM IN SEPTEMBER OF 2007

Manatee County raises in its brief indicates that Mr. Thampi had not yet pled a Title VII retaliation claim in September 2007 so therefore he could not have been retaliated against in his job application at neighboring Sarasota County. (Brief in Opposition at 20-22). As an initial matter, Thampi had an Equal Employment Opportunities Commission (EEOC) Claim pending at the time, a fact the county neglects to mention. The case was later stayed for several months pending resolution of this charge and issuance of an EEOC right to sue letter. (Doc. 32). Thampi only raises the issue that he actually pled for purposes of modern notice pleading general retaliation for filing his federal Section 1983 lawsuit in his Petition for Writ of Certiorari. (Petition at pp. 8-9).

Mr. Thampi also urges an adoption underlying the principles and logic stated in *CBOCS West, Inc. v. Humphries*, No. 06-1431 (U.S. 5/27/2008). In that case, this Court broadly applied retaliation to 42 U.S.C. Section 1981 claims, so why should that protection

also not be applied to section 1983, the operative claim as of September 2007 that was referred to as a civil rights claim in Thampi's personnel file? In fact it is common knowledge that litigants sue under Section 1983 for matters involving the First Amendment to the Constitution or due process violations.

The *Humphries* Court recently read another broadly worded statute [like Section 1983], namely Title IX of the Education Amendments of 1972 as including an anti-retaliation remedy even though such a remedy was not explicitly stated in the statute itself. *Id.* A similar construction is urged in the case at bar.

## THE COUNTY'S SO-CALLED FAIL SAFE PROVISIONS TO PROTECT THE CONFIDENTIALITY OF THE CROCKETT INVESTIGATION FAILED

The county maintained it had in place procedures to ensure that Mr. Thampi's supervisor could not have known that Thampi came forward as witness in this case (Brief in Opposition at 6-7). This policy was not discussed in the Petition for Writ of Certiorari, yet is raised by the county. This "fail safe" procedure utterly failed and Thampi draws the Court's attention to the Petition at App. 66-68.

The Assistant County Attorney Sarah Schenk announced to **third parties** that Thampi was no longer with the County while he still had not yet been officially terminated. *Id.* at 68 (emphasis added). This assertion was made on January 31, 2007, yet Thampi was not fired until February 12, 2007. *Id.* at 4. Anyone,

including Mr. Hochuli, Thampi's supervisor, could have known. Simply because the county has a policy to keep investigations secret, does not mean those investigations cannot be leaked or carelessly revealed.

The county's memorandum also states that managers shall not have any access to witness statements, but it says nothing specifically about the identities of the witnesses themselves. (Brief in Opposition at 7).

The salient facts are that the county knew of the protected expression on the part of Thampi. It is logical and certainly expected that Mr. Thampi's supervisor, Mr. Timothy Hochuli knew himself. After all, Mr. Thampi agreed to be a witness for Deloris Crockett *openly* in the office of Mr. Hochuli. (Petition for Writ of Certiorari at 3) (emphasis added).

According to Crockett, Mr. Hochuli's top assistant, Marlene Marlatt called Thampi a *stinky smelly Muslim* and indicated he should be fired. (Doc. 60-1 at 19). The animus towards Thampi by the county was unmistakable and again raises genuine issues of material fact and strong inferences that Marlene Marlatt told Mr. Hochuli that Mr. Thampi agreed to be a witness for Crockett. The Eleventh Circuit ignored where the evidence pointed.

## THE COUNTY'S ATTEMPT TO CAST A SWATH OF MISCONDUCT IS CONTRARY TO THE FINDINGS OF THE STATE OF FLORIDA

The new discussion before this Court raised about misconduct throughout a large portion of the

county's brief is misplaced. The State of Florida ruled in favor of Mr. Thampi in his state unemployment proceeding finding no evidence of misconduct. (Petition App. 73 at par. 13). Mr. Thampi was awarded unemployment benefits on March 8, 2007 with the determination that there was no misconduct as the County was unable to provide any evidence of misconduct.

The County never appealed this State ruling. Florida law indicates generally the definition of misconduct is acting in disregard to the employer's interest. *See* Fla. Stat. Sec. 443.036(29). This would seem to include insubordination. Why was the County so reticent to provide any evidence to the State, yet many months or years later they claim in their arguments Mr. Thampi's actions essentially constituted misconduct?

The county's tactic in its brief is no more than an effort to smear Thampi, an employee with an exemplary background. Still the never produced Christmas Day 2006 memo, purportedly accusing Thampi of insubordination or misconduct, which was never substantiated, lingers as nothing more than an attempt to smear (Petition for Writ of Certiorari at 4). The courts below ignored this memorandum.

Finally, in bringing up the testimony of Dan Grey and John Zimmermann, along with Jody Kirkman who rescinded his job offer to Mr. Thampi as a result of Manatee County's retaliation, the county fails to mention that the Assistant County Attorney wrote an affidavit for Kirkman in support of summary judgment

and that Mr. Kirkman blindly signed it; Messrs. Grey and Zimmerman retreated from their negative position against Thampi after being confronted with Kirkman's testimony in this case, once again raising genuine issues of material fact. (Doc. 60-1 at 9-16).

## CONCLUSION

For the foregoing reasons (and those raised in the Petition itself), Mr. Thampi's Petition for Writ of Certiorari should be granted. **Unlike the County's position, it is Mr. Thampi's position that this Court establishes the law of the land and is not so limited in its power to provide relief.** (Brief in Opposition at 29) (emphasis added).

*Swift justice is respectfully needed in this case since February of this year will mark the fourth (4th) year of Plaintiff's termination and the beginning of his legal battle for redress. As long as the unfounded charges by the county remain unaddressed, Mr. Thampi faces a bleak future for employment in his profession as an engineer.*

Respectfully submitted,

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